92-1346

No. (1)

Supreme Court, U.S.
FILED
FEB 9 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DENIS DOWD,

Petitioner,

VS.

IVRON BUTLER, FRANK A. LEDFERD,
DAVID CORDER, HERSHEL MARSH,
DOYLE KIRKMAN, JAY M. FRENCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. When plaintiffs seek actual and punitive damages and injunctive and declaratory relief against eleven defendants in six counts under 42 U.S.C. §1983, and the verdict is only for nominal damages against one defendant on one count, is the award of $95,000 in attorneys' fees to plaintiffs' counsel "reasonable" in light of *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992)?

2. May attorneys' fees on appeal be awarded when plaintiffs' primary success on appeal was preserving a $95,000 district court attorneys' fees award based on a nominal damages verdict?

STATEMENT PURSUANT TO RULE 14.1(b)

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are found in the caption of this Petition for Writ of Certiorari. The caption includes two persons who originally were plaintiffs in the district court but whose cases were voluntarily dismissed on the first day of trial: Ivron Butler and Doyle Kirkman. Also on the first day of trial all defendants but one were voluntarily dismissed with prejudice. The former defendants are:

Dick Moore

George Lombardi

Myrna Trickey

Daniel Henry

Phil Banks

Bruce Scott

Tim Sellars

Allan Luebbers

Rick Jones

Tom Gibson

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DENIS DOWD,

Petitioner,

VS.

IVRON BUTLER, FRANK A. LEDFERD,
DAVID CORDER, HERSHEL MARSH,
DOYLE KIRKMAN, JAY M. FRENCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Denis Dowd, defendant in the action below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed November 11, 1992, and the Order of the United States Court of Appeals for the Eighth Circuit awarding attorneys' fees on appeal, filed February 3, 1993.

OPINIONS BELOW

The judgment that is the subject of this petition is the attorneys' fees portion of the *en banc* opinion of the United States Court of Appeals for the Eighth Circuit entered on November 11, 1992. *Butler v. Dowd*, 979 F.2d 661 (8th Cir. 1992). Amend-

ments to the dissenting opinion in ways not material to this petition were made on November 17, 1992 and January 7, 1993. A copy of the *en banc* opinion, as amended, is reproduced in Appendix A. The opinion covers three appeals which were consolidated by order of the United States Court of Appeals for the Eighth Circuit dated December 10, 1990. The consolidation order is reproduced in Appendix B. This petition is directed only to one of those consolidated appeals—No. 90-2782EM—which dealt with the award of attorneys' fees to plaintiffs/respondents by the district court.

A petition for rehearing en banc was granted by Order of the United States Court of Appeals for the Eighth Circuit on April 1, 1992, which is reproduced in Appendix C. This order vacated a panel opinion that had been entered February 6, 1992. The vacated order is not published, but can be found in WESTLAW, 1992 WL 18260. The appeal to the Eighth Circuit on attorneys' fees was from an Order of the United States District Court for the Eastern District of Missouri entered September 17, 1990 (Cause No. 89-0276-C(6)), which is reproduced in Appendix D. The district court issued a Memorandum in connection with that order on September 19, 1990, which is reproduced in Appendix E.

Petitioner also seeks review of the Order entered by the United States Court of Appeals for the Eighth Circuit on February 3, 1993, awarding plaintiffs $12,000 in attorneys' fees for work on appeal, together with costs in the amount of $47.25. This order is reproduced in Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the award of attorneys' fees in the district court was entered on November 11, 1992. The Order of the United States Court of Appeals for the Eighth Circuit awarding attorneys' fees on appeal was entered February 3, 1993. This petition was filed and served in accordance with the

rules of this Court within 90 days of November 11, 1992 and February 3, 1993. Jurisdiction of this Court is founded upon 28 U.S.C. §1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Plaintiffs/respondents are four of six prisoners who sued various corrections officials and employees, alleging that defendants failed to adequately protect them from being sexually assaulted by other inmates. Plaintiffs brought their claims under 42 U.S.C. §1983, and asserted jurisdiction in the district court pursuant to 28 U.S.C. §§1331 and 1343. During the course of the jury trial the case was narrowed to four plaintiffs against one defendant (the prison Superintendent) on one count. The evidence was undisputed that protective or administrative housing was made available to plaintiffs upon request, and they admitted they were never raped in such housing.

Plaintiffs sought wide-ranging relief, including actual and punitive damages and extensive injunctive relief which would have altered many prison policies or created new policies and programs. The jury refused to awarded actual or punitive damages. Pursuant to a jury instruction requested by plaintiffs, only nominal damages of $1 per plaintiff were awarded. The verdict was general one, so there were no express findings as to the nature of the alleged sexual assault found (physical or

verbal), and there were no findings that plaintiffs were seriously injured, that the Superintendent was responsible for many of the injuries plaintiffs alleged they sustained, or that the policies of the institution were improper.

After the verdict, plaintiffs filed motions seeking injunctive and declaratory relief, and requested a new trial limited to damages. The post-trial motions were denied.

Having avoided a defense verdict by the skin of their teeth and having lost on efforts to obtain equitable relief, plaintiffs then claimed that under 42 U.S.C. §1988 they were entitled to attorneys' fees for their "success." The district court calculated a lodestar of $94,680. The district court made no downward adjustment in the lodestar in light of the lack of success (Appendix D, at A-51 and Appendix E, at A-55).

Plaintiffs appealed the denial of their post-trial motions to the Eighth Circuit pursuant to 28 U.S.C. §1291. Petitioner/defendant appealed from the judgment and the attorneys' fees award, with the major significance of the appeal from the nominal damages judgment being the fact that it formed the basis for the large attorneys' fees award.

The case was first heard by a panel of the United States Court of Appeals for the Eighth Circuit. In a two-to-one decision, the panel held that plaintiffs were entitled to a new trial limited solely to the issue of damages and were entitled to a further hearing on injunctive relief. The panel remanded the attorneys' fees issue to the district court to make either an upward or downward adjustment after further proceedings on damages and injunctive relief.

Petitioner's suggestion for rehearing en banc was granted, which vacated the panel opinion (Appendix C, at A-50). After argument, the court en banc affirmed the judgment of the district court in all respects, including attorneys' fees (Appendix A).

One month later this Court issued its decision on attorneys' fees in cases in which only nominal damages are awarded in *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992).

Petitioner consistently opposed the attorneys' fees award. Petitioner argued for a at least a 90% reduction in the fee awarded by the district court to "no more than" $10,000. Brief of Appellee-Cross-Appellant, at 30. Petitioner's brief did not suggest that there was a floor on the amount of attorneys' fees which plaintiffs could be awarded.

Plaintiffs also sought attorneys' fees in the amount of $32,000 for their work on appeal. The Eighth Circuit awarded plaintiffs $12,000 in attorneys' fees, stating that *Farrar* "is not directly applicable to this case, nor to the application for fees on appeal." The Eighth Circuit went on to note that "had the *Farrar* decision been issued prior to the filing of the en banc opinion in this case, it may well have altered our view as to the allowability of fees at the trial" (Appendix F, at A-56).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS UPHOLDING A LARGE ATTORNEYS' FEES AWARD BASED ON A NOMINAL DAMAGES VERDICT IS CONTRARY TO THIS COURT'S RECENT DECISION IN *FARRAR v. HOBBY*.

This Court should vacate the judgment below, as it has done with other attorneys' fees cases involving nominal damages since *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992). Pursuant to *Farrar*, plaintiffs/respondents are entitled to no attorneys' fees for their unsuccessful effort in the district court.

This Court stated in *Farrar*: "*When a plaintiff recovers only nominal damages because of a failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.*" 113 S.Ct. at 575 (citations omitted). As Justice O'Connor stated: "*When the plaintiff's success is purely technical or de minimis, no fees can be awarded.*" *Id.* at 576 (O'Connor, J., concurring). This case falls squarely within the directives and facts of *Farrar*, so the only reasonable fee for these plaintiffs is $0.

In *Farrar* the Court held that even though a nominal damages award may be sufficient to make a plaintiff a "prevailing party," that does *not* mean that the plaintiff is entitled to attorneys' fees. In *Farrar* this Court found that the plaintiff's lack of success was so obvious that the lower courts *did not have the discretion* to award anything other than $0 in fees, and this Court did not remand the case.[1] The statement made by this Court in *Farrar* is fully applicable here: "This litigation accomplished little

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[1] The Fifth Circuit denied fees on the basis that nominal damages did not make the plaintiff a prevailing party. This Court disagreed, but affirmed the result because the lower court had no discretion to award fees to a party who "prevailed" to such a limited extent.

beyond giving petitioners `the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." 113 S.Ct. at 574, *citing Hewitt v. Helms*, 482 U.S. 755, 762 (1987).

In *Farrar* the plaintiff alleged that state officials deprived him of property and liberty without due process in closing a school for disturbed teens. The jury found that there had been an unconstitutional conspiracy, but concluded that the plaintiff was not damaged as a result. The plaintiff received only nominal damages. This Court denied attorneys' fees.

Here the facts are even more egregious. Respondents were part of a group of six original plaintiffs who sued eleven defendants on six counts alleging that defendants were responsible for plaintiffs being sexually assaulted by other inmates. They sought $300,000 in actual damages, $5,000,000 in punitive damages, declaratory relief, and injunctive relief.[2] The jury here, as in the *Farrar* case, found that plaintiffs were not damaged, and thus plaintiffs had "recover[ed] only nominal damages because of a failure to prove an essential element of [their] claim for monetary relief," meaning no fees should be awarded under *Farrar*. 113 S.Ct. at 575. Plaintiffs technically "prevailed" on four of the 396 potential verdicts.

Plaintiffs' lawyer admits that the verdict was indeed purely technical and *de minimis*. *He* characterized it as a "take-nothing verdict," the same type of verdict rendered in *Farrar*. 113 S.Ct. at 570; see Plaintiffs' Memorandum in Support of Motion for

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[2] The injunctive relief sought included a new classification system to segregate those persons meeting a supposed predator profile (who plaintiffs described as large, African-American repeat offenders) from persons like the plaintiffs (white, first-time offenders). They asked to be transferred to a different prison and sought a new training program for employees, they wanted to star in a video to be shown to new inmates, they demanded that more protective custody cells "be available," and they sought many other new specific procedures.

New Trial on Damages, filed in district court 4/12/90. It was plaintiffs who appealed first, and, except for the fees award, they certainly considered the case a "loss." Plaintiffs' lawyer argues that the verdict implies that an important constitutional right was denied, but the *Farrar* Court stated that such a general implication was *not* enough to warrant an attorneys' fees award. 113 S.Ct. at 574. The general verdict here implied only that plaintiffs' rights had been violated in some unspecified way. As the concurring opinion in the Eighth Circuit points out, one cannot even tell if the jury concluded that plaintiffs were raped (Appendix A-31 to 32). The verdict does not indicate whether the jury believed there was a defective policy, a failure to follow policy, a failure to supervise, or some other situation that led to a plaintiffs' verdict. Nor is there any evidence that changes in policy occurring before, during, or after the litigation were in any way prompted by the litigation. In fact, plaintiffs resisted efforts at policy changes by filing a grievance when a change that could decrease the risk of assault was made. See en banc opinion, Appendix A at A-24. In other words, this verdict does not have policy implications beyond this case.

Attorneys' fees should not be the centerpiece of §1983 litigation. Fees awards are not intended to produce "windfalls to attorneys." *Farrar*, 113 S.Ct. at 575, *citing Riverside v. Rivera*, 477 U.S. 561, 580 (1986). This Court should not allow plaintiffs any attorneys' fees for this case.[3]

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[3] If plaintiffs/respondents argue that there has been a waiver of the *Farrar* argument, they would be wrong. This Court has held that there must be full and immediate application of Supreme Court rulings to all pending cases. *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439 (1991). Furthermore, the failure to raise an argument prior to the announcement of a decision to support it is not a waiver. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1966). Also, the *Farrar* opinion did not find a waiver of the "prevailing party but no fees" argument.

(Footnote 3 continued on next page)

II. THE AWARD OF ATTORNEYS' FEES ON APPEAL IS ALSO CONTRARY TO *FARRAR v. HOBBY*

If there was error in sustaining the attorneys' fees award, then plaintiffs should not be considered prevailing parties for purposes of the appeal. If district court fees are denied (or even substantially reduced), plaintiffs will have lost on every issue on appeal except the sustaining of the verdict of $1 per plaintiff. As explained above, "success" on that issue is *de minimis* under *Farrar*. This is especially true here, where the significance of the nominal damages award came from the fact that it was used as a hook for nearly $100,000 in fees.

Furthermore, contrary to the statement in the Order of the Eighth Circuit, there is no reason why *Farrar* would not or should not apply to appellate fees awards.

III. THIS COURT SHOULD SUMMARILY REVERSE THE JUDGMENT OF THE COURT OF APPEALS OR, ALTERNATIVELY, VACATE THE JUDGMENT AND REMAND TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF *FARRAR v. HOBBY*.

A summary reversal or a remand with specific instructions to apply *Farrar* to the district court and appellate fees awards is

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(Footnote 3 continued)

Furthermore, even though "waiver" is not an issue under the above authorities, petitioner/defendant in fact always argued for a drastic reduction in the fees awarded by the district court, an argument buttressed by *Farrar*. For instance, petitioner asserted that the district court attorneys' fees award should be reduced to "no more than $10,000." Brief of Appellee-Cross-Appellant, at 30. See also Reply Brief of Appellee-Cross-Appellant, at 17 (requesting substantial reduction in fees award). Petitioner did not assert that plaintiffs were entitled to some fees. The only thing that petitioner did not do was explicitly state that the requested reduction could be down to $0. Petitioner conceded that plaintiffs were prevailing parties, a fact alluded to in footnote 23 of the en banc opinion (Appendix A-28). *Farrar* confirmed that petitioner's concession on this point was correct.

necessary in this case. The Eighth Circuit stated in its Order of February 3, 1993 that it did not consider *Farrar* to be "directly applicable to this case, nor to the application for fees on appeal" (Appendix F, at A-56). It is important that this Court make clear that *Farrar* does apply to a case like this one, and that it does apply to appellate fees awards. The facts of this case are so overwhelming and so clearly within the scope of *Farrar* that summary reversals on both the district court and appellate fees issues are appropriate. It is noteworthy that the only suggestion in *Farrar* as to the type of case where nominal damages may support an attorneys' fees award is a procedural due process case. This is not a procedural due process case.

This Court has already vacated judgments awarding substantial attorneys' fees based on nominal damages awards since the *Farrar* decision was rendered. *Nichols v. Romberg*, 61 LW 3498, No. 92-402 (U.S. Jan. 19, 1993), *vacating and remanding* 953 F.2d 1152 (9th Cir. 1992)(nominal damages; lower court reduced lodestar by 50%); *Kolodzieczak v. Friend*, 61 LW 3498, No. 92-292 (U.S. Jan. 19, 1993), *vacating and remanding* 965 F.2d 682 (9th Cir. 1992).

At a minimum, *Farrar* stands for the proposition that there should be a dramatic reduction in the attorneys' fees award, and an award of the district court lodestar figure (reasonable rate times hours) cannot be sustained. Similarly, the adjustment in the district court judgment necessarily requires an adjustment in the appellate court fees, and that adjustment should take *Farrar* into account.[4]

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[4] Any reversal or vacation of the November 11, 1992 judgment should be limited to that part of the judgment of the Eighth Circuit which affirmed the attorneys' fees order of the district court dated September 17, 1990 (Eighth Circuit Appeal No. 2782EM). The underlying judgment is not the subject of this petition. The appeals from the underlying judgment were separate from the attorneys' fees appeal, and were merely consolidated by the appellate court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted. The judgment of the United States Court of Appeals for the Eighth Circuit as it relates to plaintiffs' claim for attorneys' fees (Eighth Circuit Appeal No. 90-2782EM) should be reversed and remanded with directions to enter judgment for petitioner on respondents' claim for attorneys' fees in the district court. The February 3, 1993 Order of the Eighth Circuit awarding attorneys' fees on appeal should also be reversed and remanded with directions to deny all fees to respondents for work on appeal. Alternatively, (1) the attorneys' fees portion of the November 11, 1992 judgment and (2) the Order of February 3, 1993 awarding attorneys' fees on appeal should be vacated and remanded to the United States Court of Appeals for the Eighth Circuit, all for further consideration in light of *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992).

Respectfully submitted,

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February 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2090EM

Ivron Butler, Frank A. Ledferd,
David Corder, Hershel Marsh,
Appellants,
Doyle Kirkman, Jay M. French,
Appellant,

v.

Denis Dowd,
Appellee,
Daniel Henry, Phil Banks,
Bruce Scott, Tim Sellars.

No. 90-2091EM

Ivron Butler, Frank A. Ledferd,
David Corder, Hershel Marsh,
Appellees,
Doyle Kirkman, Jay M. French,
Appellee,

v.

Denis Dowd,
Appellant,
Daniel Henry, Phil Banks,
Bruce Scott, Tim Sellars.

No. 90-2782EM

Ivron Butler, Frank A. Ledferd, David Corder,
Hershel Marsh, Doyle Kirkman, Jay M. French,
Appellees,

v.

Denis Dowd,
Appellant,
Daniel Henry, Phil Banks,
Bruce Scott, Tim Sellars.

Appeals and Cross-Appeal
from the United States District Court
for the Eastern District of Missouri.

Submitted: July 21, 1992
Filed: November 11, 1992

Before RICHARD S. ARNOLD, Chief Judge, LAY and BRIGHT, Senior Circuit Judges, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS S. ARNOLD, Circuit Judges, En Banc.

MAGILL, Circuit Judge.

These prison inmates assert claims pursuant to 42 U.S.C. § 1983 against their custodians, the prison officials, for permitting them to be homosexually raped by other inmates in violation of their Eighth Amendment rights. Plaintiffs Frank Ledferd, David Corder, Hershel Marsh and Jay French appeal from the trial court's[1] denial of their motions for a new trial on damages and for declaratory and injunctive relief. Defendant Denis Dowd cross-appeals, claiming that the trial court erred in denying his motion

[1] The Honorable Robert L. Kingsland, United States Magistrate Judge for the Eastern District of Missouri.

for judgment notwithstanding the verdict and that the trial court abused its discretion in awarding plaintiffs' counsel almost $95,000 in attorneys' fees. Dowd also argues that a jury instruction erroneously set out the standard to determine whether there was an Eighth Amendment violation. We affirm.

I.

The Farmington Correctional Center (FCC) is a near-maximum security facility located in Farmington, Missouri, that houses high-level security inmates serving long sentences for serious crimes. During 1988-89, all four plaintiffs were inmates of FCC[2] Denis Dowd was the Superintendent at FCC from January 1, 1987, through March 30, 1990. On February 17, 1989, the four plaintiffs[3] filed a complaint under the Civil Rights Act, 42 U.S.C. § 1983, against Dowd and four of his staff members, alleging, *inter alia*, that they had been homosexually raped by other inmates and Dowd had failed to protect them . After counsel was appointed, plaintiffs filed an amended complaint against Dowd, three of his superiors and seven staff members. The complaint alleged six causes of action. Only one cause of action against one defendant, however, was submitted to the jury: the claim that Dowd violated plaintiffs' constitutional rights by recklessly or knowingly subjecting them to a pervasive risk of sexual assault.[4] The evidence presented by both parties focused on whether there was a pervasive risk of sexual assault at FCC, whether Dowd had acted with deliberate indifference or reckless disregard by subjecting the plaintiffs to such a risk and whether Dowd failed to protect the plaintiffs from assault.

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[2] Three of the plaintiffs have since been released. Only David Corder is still incarcerated. His first parole hearing is set for December 1992.

[3] Two other inmates were also plaintiffs in the original action. Their claims were voluntarily dismissed before trial.

[4] The other defendants were dismissed by plaintiffs prior to trial. The five other causes of action were dismissed by plaintiffs after the evidence had been presented to the jury but before the case had been submitted to them.

The setting in which plaintiffs claim to have been sexually assaulted is as follows. Each 100-foot, two-story wing of the prison, containing sixty-five- to seventy-square-foot, double-occupancy cells, is controlled from a central "bubble." From inside this bubble, the control officer monitors all activity in the hall and second-floor walkway of the wing. The officer has a view of the doors to the cells. In the door of each cell is a window about two-thirds the size of a legal pad. The window is covered with mesh. There are four microphones spaced twenty-five feet apart in the ceilings of each wing, and if a prisoner calls out from a cell the officer in the bubble will hear him. For example, if the prisoner calls out his cell number, the officer, who controls unlocking the cell doors from the bubble, can press a switch to unlock the cell. The officer cannot hear conversations that take place in a normal tone of voice. There are set periods of time called "open wing" when prisoners can move freely within the wing and visit each other if they wish. During the time period relevant to this suit, the rules applicable to open wing were that all cell doors were to be left open if an inmate who did not live there was visiting, but otherwise the doors had to be closed.[5] At 10:00 p.m., after evening open wing, the prisoners are locked into their cells for the night. This is called "lock down." The guards then conduct a custody count of each cell by switching the cell light on from the outside and looking to see if there are two prisoners in each cell. They do not look at the prisoners' faces, so they do not know if the inmates are in the correct cells.

Prisoners who are threatened within the general population of FCC can request protective custody. The policy for the entire Missouri prison system is that an inmate requesting protective custody must spend three days in administrative segregation

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[5] This policy has been changed to require that the cell doors be open at all times during open wing. One of the plaintiffs, David Corder, filed a grievance protesting this change of policy.

pending a hearing before the Classification Committee[6] before being accorded protective custody. Administrative segregation is a closely-monitored area generally used to punish prisoners for rules violations. Usually the wait in administrative segregation is longer than three days because there is a waiting list for bed space in protective custody. The wait can be up to several weeks. There was testimony from several witnesses about the differences in conditions between administrative segregation and protective custody. For example, prisoners in administrative segregation receive very little of their personal property, no phone calls for the first thirty days, and have five minutes every other or every second day to either shower or clean their cell. The cells do not contain any furniture. Prisoners in protective custody, in contrast, get most of their personal property, some phone privileges, an hour a day out of the cell, and the cells contain furniture.

The evidence at trial indicated that the following happened to the plaintiffs after their arrival at FCC. Hershel Marsh, a nineteen-year-old, white, first-offender convicted of child abuse, arrived at FCC in July 1988. According to Marsh's testimony, prisoner William Stapleton, a black man, approached Marsh within 1 1/2 hours of his arrival at FCC and told him Stapleton would "fuck" him that night. Marsh was scared, but only told his cellmate about the encounter. That evening Stapleton came to Marsh's cell and talked to him for "several hours," but did not make any threats. The next day, Marsh met Stapleton in the gym and agreed to lift weights with him. That night, Marsh went to Stapleton's cell to discuss a weight-lifting schedule. Stapleton

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[6] The Classification Committee evaluates requests for protective custody and recommends a course of action to the Superintendent. The Committee also evaluates requests by prisoners in administrative segregation waiting for protective custody or by those already in protective custody to be returned to general population.

closed the cell door and raped him.[7] A week later, Stapleton told Marsh to come to his cell that evening. Marsh did so, and Stapleton raped him again. Marsh did not tell anyone about these attacks. In October or November, Stapleton told Marsh to request a cell change so that they could be cellmates. At that time they were living in different wings of the prison, so Marsh only saw Stapleton outside in the yard. Marsh asked for the cell change and his request was granted even though it was prison policy not to assign white and black inmates to the same cells. Although Marsh's caseworker discussed the request with him, Marsh claimed that Stapleton was present during the interview. The caseworker, Tom Gibson, testified that he talked to Marsh alone about the requested cell change and Marsh told him that there were no problems, that he and Stapleton were weight-lifting buddies and wished to live together. Marsh, on rebuttal, claimed that the one time he and Gibson discussed the cell change without Stapleton present, Gibson had called Marsh to his office on the loudspeaker and, therefore, Stapleton knew that he was talking to Gibson. Marsh testified that Stapleton raped him repeatedly after they became cellmates.

During this time, Stapleton also raped two of the other plaintiffs, Ledferd and Corder. In both instances, Stapleton told Marsh to switch cells with the victim for the night and Marsh did so. Marsh kept his face hidden when the guards passed so they could not tell that he was in the wrong cell.

Marsh did not report any of these incidents. In November, Marsh attempted to check into protective custody. Marsh testified that he told the prison officials his cellmate was forcing him

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[7] A closed cell door automatically locks. When prisoners wish to leave the cell, they call out their cell number. The officer in the bubble hears this through the microphones in the ceiling of the wing and presses a button that opens the door. Therefore, a guard is not present when the prisoners leave the cell and would not necessarily notice if the prisoners were not the inmates assigned to the cell.

to have sex. The check-in form filled out by prison officials recorded only that Stapleton was making Marsh pay his debts to other prisoners. Marsh was put in administrative segregation pending a hearing and available bed space in protective custody. Marsh testified that, shortly afterward, Stapleton, who worked in administrative segregation, contacted Marsh and threatened to harm him and his family if he maintained his allegations against Stapleton and stayed in administrative segregation. Stapleton provided Marsh with a typed letter stating that his allegations against Stapleton were not true, which Marsh signed. Although prisoners in administrative segregation are not allowed access to pens, paper or typewriters, no investigation into the origin of the letter took place. When his request for return to general population came before the Classification Committee, Marsh reaffirmed that his allegations against Stapleton were untrue. He then signed a statement saying that he was not in any danger and did not need protective custody. Marsh was returned to the same housing unit as Stapleton in general population,[8] where Stapleton again raped him. In January 1989, in preparation for this lawsuit, Marsh informed FCC officials about the sexual assaults and entered administrative segregation and then protective custody. After he informed FCC officials of the assaults, he was not assaulted again.

Frank Ledferd, an eighteen-year-old first-offender convicted of two counts of sodomy, entered FCC in October 1988. According to his testimony, approximately two weeks after his arrival at FCC he was sexually threatened by an inmate whose identity he did not know. He approached prisoner Rob Johnson, whom he had seen in the other inmate's company, because he wanted to discuss the threat and try to "straighten things out." Johnson closed the door of the cell and raped him. The next day Ledferd checked into protective custody and was placed in administrative segregation. He told the prison official who checked him in

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[8] He was not, however, reassigned to the same cell.

that he was being pressured for sex, but he did not tell the official about the assault. He claimed that the Classification Committee refused to assign him to protective custody because he couldn't name the individuals who were threatening him. Ledferd signed a statement saying that he was not in any danger and did not need protective custody. The Committee returned him to general population.

Ledferd then discussed the situation with his cellmate, Corder, who told him to go to Stapleton because Stapleton was "ok" and "not like all the rest." On Corder's advice, Ledferd went to Stapleton for help. Stapleton closed the door on the cell and told him he would be staying there that night. When the guards came by, Stapleton told him to lie facing the wall so the guards could not see his face and he did so. Stapleton then raped him. After that, about once every week, Stapleton would tell him to come to Stapleton's cell, where Stapleton would rape him. In January 1989, in preparation for this lawsuit, Ledferd informed FCC officials of the assaults. The prison staff checked him into administrative segregation pending bed space in protective custody, but Ledferd requested to be returned to general population two weeks later. In April, he entered protective custody at the insistence of the prison staff.

David Corder, a twenty-three-year-old first-offender convicted of burglary and sodomy, arrived at FCC in July 1988. According to his testimony, a few days after he arrived at FCC, he went to Stapleton's cell because Stapleton told him to go there. Stapleton told Corder that he was going to spend the night with Stapleton. Corder was there for several hours before lock down, but he did not call out or try to leave. Marsh, Stapleton's cellmate, was in and out several times getting things so that he could stay in Corder's cell for the night. When the guards came around later that evening, Stapleton told him to sit on a footlocker facing away from the door. He did this. Afterward, Stapleton raped him. A few days later, another inmate came to Corder's cell and threatened him. Corder hit the other

inmate and locked the man in his cell. He then found a guard and told the guard about the incident. Corder was put into administrative segregation for punishment for thirteen days. While there, he requested protective custody. Stapleton threatened him, however, and made him sign a statement that he and the inmate who threatened Corder in his cell were not enemies and he did not need protective custody. Corder was then returned to general population. In January 1989, in preparation for this lawsuit, he informed FCC officials of the sexual assault. Corder was not sexually assaulted after that time. He has refused to enter protective custody, however, because he has to go through administrative segregation first.

Jay French, twenty-one and convicted of burglary, arrived at FCC in December 1988. French had been in jail before, but not in prison. According to French's testimony, when he arrived at FCC he bought a television from prisoner George Anderson, contrary to prison rules. Although he paid for the television, Anderson claimed that he had not and told him he would have to pay "homosexually." French attempted to check into protective custody, complaining that he was being pressured for sex, and was put in administrative segregation pending a hearing and available bed space in protective custody. He requested to be returned to general population, however, because he learned that Anderson was going to follow him into protective custody and he was afraid Anderson would kill him.[9] Soon after his return to

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[9] Daniel Henry, an official at FCC, testified that, while serving as Acting Superintendent during Dowd's absence, he approved a Classification Committee recommendation that French, who had requested protective custody because he was being pressured for sex by another inmate, be returned to general population. French said he wished to return to general population because he preferred that to going to administrative segregation pending bed space in protective custody. Henry did not conduct any investigation into French's allegations, and he approved returning French to his prior cell even though that cell was in close proximity to the cell of the inmate French claimed was pressuring him for sex. Henry had no instructions to conduct an investigation or to take any other action in this type of case.

general population, Anderson's "associate," Darryl Saddler, raped French in French's cell. Later, Anderson approached French. When French started to cry, Anderson only required French to touch his penis. A few days later, however, Anderson told French to come to his cell. French went, and Anderson forced him to perform oral sex on Anderson. In January 1989, in preparation for this lawsuit, French informed FCC officials of the assaults. He has not been assaulted since that time. During his testimony, French stated that he did not think Dowd intended to hurt him and that Dowd probably didn't know about French's specific situation until French had made his statement. He believes, however, that Dowd must have known about the "general situation."

Plaintiffs introduced several pieces of evidence intended to show that Dowd must have known about the threat of sexual assault at FCC. Plaintiffs contended that there is a certain profile that can be used to identify prisoners who are likely to be victimized by other prisoners and that they fit this profile. They also argued that Dowd knew this, and that he either knowingly or recklessly failed to take steps to protect vulnerable prisoners from others whose records show that they are aggressive and violent.[10] Dr. Ronald Sable, plaintiffs' expert witness, testified that younger inmates, who are smaller and slightly built, who are first offenders or naive with respect to the correctional system, and who have generally passive personalities, tend to be victimized. Dr. Sable testified that he believed plaintiffs fit this description. He stated that, given the record of the men who assaulted plaintiffs, the administration should have known that this was a very real danger. Plaintiffs introduced into evidence an affidavit signed by Dowd to show that Dowd knew the plaintiffs were at risk. The affidavit read, in relevant part:

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[10] All the inmates accused of rape in this case were serving long sentences for violent crimes and have histories of violence toward other prisoners.

> Plaintiffs in this action are typical of the type of inmate who normally receives such intimidation from other inmates. Plaintiffs exhibit generally passive personalities and are unable to stand up to these inmates threatening them. It is likely that plaintiffs will be subject to such treatment by other inmates wherever they go.

Aff. of Denis D. Dowd, Appellant's App. at 61.

Richard Jones, an employee of FCC, testified that he had read approximately 100 reports of sexual assaults at FCC over a three-year period beginning in 1987. The evidence showed, however, that Dowd had never referred a case of sexual assault for prosecution and had referred only a very few cases for investigation. Plaintiffs' assaults were not investigated after plaintiffs reported them in January 1989. Dr. Sable testified that, according to documents he reviewed, there were fourteen reported rapes within an eighteen-month period at FCC, and he believed the incidence of unreported rapes to be much higher. Doyle Kirkman, a prisoner at FCC, testified that he had overheard conversations in the presence of guards where some inmates demanded sexual favors, money, and clothing from other inmates and discussed sexual activity on the prior night with their "wives." Dowd was not present during these conversations, but he testified that his staff was instructed to report any such major violations to him.

FCC employees testified that they had had no training or instruction about how to handle sexual abuse or assault problems between prisoners. The orientation program for new prisoners does not contain a component relating to sexual abuse of prisoners by other prisoners; it neither warns prisoners of the occurrence of such abuse nor apprises them that such abuse will be punished. Plaintiffs claimed that the orientation program also did not inform them about how to obtain protective custody. They testified that they did not know how to request protective custody until other inmates told them.

In addition, plaintiffs introduced evidence that at the time relevant to this suit, prisoners were assigned to cells randomly and there was no effort to separate passive inmates from aggressive inmates. Dr. Sable testified that he believed it was reckless to randomly assign people to cells.

Dr. Sable also testified that requiring prisoners to spend time in administrative segregation before they are assigned to protective custody is a heavy burden on inmates seeking protective custody. FCC employee Jones estimated that more than one inmate per month decided not to go into protective custody because they had to go through administrative segregation.

Denis Dowd testified that he had never read in the professional literature about specific characteristics that indicated some inmates are more prone to sexual assault than others. He stated that the affidavit he signed referred to verbal intimidation and was in response to plaintiffs' demand for transfers to another prison, not their allegations of sexual assault.[11] Dowd said that he believes FCC has fewer rapes than other prisons, and he does not know what further steps the prison could take to stop these occurrences. Dowd said that he has never referred a reported prison rape for prosecution because he has never had a reported case that included physical evidence or an eyewitness. He did not account for the fact that there was no investigation of plaintiffs' rapes after they were reported in January 1989. He explained that he approved the return of prisoners to the general population after they claimed they were being pressured for sex if the Committee recommended that course of action. Despite the Committee review process, prisoners who insist they need protective custody are not returned to general population.[12] If an

[11] Plaintiffs originally sued for, *inter alia*, transfer to the Missouri Eastern Correctional Center. That prison does not have any protective custody available, and sends those inmates who need protective custody to FCC.

[12] Several other FCC officials also testified that no prisoner who persists in their request for protective custody throughout the review process is ever denied protective custody.

inmate insists that he wants to return to general population, however, and signs a statement saying he is not in any danger, there is very little the prison staff can do to help that prisoner. He said that the inmates have to report incidences before the prison staff can help them, and these plaintiffs did not report that they had been assaulted until January 1989. He emphasized that none of them had been assaulted after they had informed the FCC staff of the problem.

Dowd testified that it is not prison policy to deny an inmate protective custody because he will not or cannot name his enemies. Dowd also testified that Stapleton could not have gotten close enough to either Marsh's or Corder's cells in administrative segregation to be able to intimidate them.

In response to Dr. Sable's testimony about assigning prisoners to cells at random, Dowd pointed out that none of the plaintiffs except Marsh were assaulted by their assigned cellmate, and Marsh had requested a cell change to live with his attacker.

Several prison officials testified that it was standard procedure to inform incoming inmates about the availability and procedures for obtaining protective custody. The evidence showed that all four plaintiffs signed forms when they arrived at FCC saying they did not need protective custody.

After a four-day trial, the jury found in favor of plaintiffs, but awarded them only $1 each in nominal damages. Plaintiffs moved for a new trial on damages and requested that the district court grant them injunctive and declaratory relief. Dowd moved for judgment notwithstanding the verdict (j.n.o.v.). The district court denied all post-trial motions and awarded plaintiffs attorneys' fees in the amount of $94,690, pursuant to 42 U.S.C. § 1988.

Plaintiffs appealed, arguing that the district court erred in denying them a new trial on the issue of damages and in denying

their requests for declaratory and injunctive relief. Dowd cross-appealed, arguing that the district court erred in denying his motion for j.n.o.v. Dowd also argued that the district court abused its discretion when it awarded plaintiffs attorneys' fees because it failed to consider the plaintiffs' lack of overall success. A panel of this court heard argument, and held that plaintiffs were entitled to a new trial solely on the issue of damages and a further hearing on injunctive relief. The panel left the question of attorneys' fees undecided pending the new trial on damages. It affirmed the trial court on all other issues. Dowd moved for rehearing and rehearing en banc. We granted the motion for rehearing en banc and vacated the panel opinion. We now affirm the trial court on all issues.

II.

A. New Trial on Damages

Plaintiffs claim that the jury's award of nominal damages was inadequate as a matter of law. Specifically, plaintiffs argue that the evidence shows that they were raped, and that they suffered physical and emotional distress as a result. Indeed, this court has recognized that rape is devastating. *Vosburg v. Solem*, 845 F.2d 763, 768 (8th Cir.), *cert. denied*, 488 U.S. 928 (1988). Only when a jury's award is so inadequate as to constitute "plain injustice" or a "shocking" result, however, may we overturn it. *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961). When making this determination, "a comparison of verdicts in other cases is of limited value as each case must be evaluated according to the evidence peculiar to that case." *Century "21" Shows v. Owens*, 400 F.2d 603, 611 (8th Cir. 1968); *Perry v. Bertsch*, 441 F.2d 939, 944 (8th Cir. 1971).

Plaintiffs contend that the only explanation for an award of nominal damages to all four plaintiffs is the jury's bias against their status as prisoners; thus, the award constitutes "plain

injustice." We disagree. The plaintiffs' status as prisoners is not the only explanation for the jury's award. The jury rationally could have concluded that many of the plaintiffs' injuries would have occurred even if the defendant's conduct had met constitutional standards. Moreover, plaintiffs failed to produce at trial objective medical evidence supporting their physical injuries or detailing the extent of their emotional injuries. The amount of damages, therefore, depended largely upon the credibility of the plaintiffs' testimony concerning their injuries. We find that based upon these factors, the jury's decision to award only nominal damages was not "plain injustice" or so "shocking" as to require a new trial on the issue of damages.

The jury could have awarded nominal damages because it concluded that the plaintiffs' actions, not those of the defendant, were the cause in fact of most of the plaintiffs' injuries. In order to establish a violation of constitutional rights under § 1983, the plaintiff must prove that the defendant's unconstitutional action was the "cause in fact" of the plaintiff's injury. *Carey v. Piphus*, 435 U.S. 247, 263 (1978); *Cowans v. Wyrick*, 862 F.2d 697, 703 (8th Cir. 1988) (McMillian, J., concurring). Conduct is the cause in fact of a particular result if the result would not have occurred but for the conduct. Similarly, if the result would have occurred without the conduct complained of, such conduct cannot be a cause in fact of that particular result. *Carey*, 435 U.S. at 263; *see* W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 41, at 264 (5th Ed. 1984). In the context of this case, plaintiffs have to prove that the defendant's *unconstitutional* conduct was the cause in fact of the sexual assaults they suffered. If, however, an assault would have occurred even if the defendant had not been "deliberately indifferent to a pervasive risk" of sexual assault, the defendant cannot be liable for that assault.

The jury did find that the defendant's unconstitutional actions were the cause in fact of at least one of the attacks on each plaintiff. The jury could, however, have found the defendant's

unconstitutional actions were not the cause in fact of many of the plaintiffs' injuries and still have returned a verdict for plaintiffs. The evidence presented to the jury detailed numerous assaults against each plaintiff. The jury did not, however, have to believe that the defendant's actions caused *each* attack in order for it to find for each plaintiff. Each attack was a separate event, and the relevant causal inquiry is whether that attack would have been prevented if the defendant's actions had met constitutional standards.

Furthermore, the jury charge would allow the jury to so find. The jury specifically was instructed that it could find the defendant liable to each plaintiff if it found *one* incident of assault for which the defendant was responsible. Tr., Vol. V at 47. Moreover, the jury was charged that it could award damages only for those injuries that were a direct result of the defendant's actions. Tr., Vol. V at 48.

Because the jury returned a general verdict, we cannot tell which attacks or injuries the jury concluded were caused by the defendant's unconstitutional actions, or whether the jury believed that certain of the attacks would have occurred anyway.[13] We also cannot tell what evidence the jury found necessary to conclude that the defendant breached his constitutional duty. Given this uncertainty, the jury could likely have believed that the plaintiffs' actions, and not the defendant's unconstitutional conduct, caused many of their injuries.

Ample evidence in the record supports such a conclusion. First, in many of the assaults complained of, the plaintiff went to

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[13] We may speculate that the jury could have concluded the plaintiffs did not prove the defendant caused all of their injuries because the plaintiffs submitted to the jury a general verdict form concerning the question of damages—one that makes it impossible to determine which claims the jury did or did not believe. *Cf. Williams v. North Carolina*, 317 U.S. 287 (1942) (general verdict of guilty cannot stand if one potential ground is unconstitutional because a general verdict does not state what the jury decided).

the cell of his attacker. The assailant did not lead him there. Instead, on several occasions a significant period of time elapsed before the plaintiff walked by himself to his assailant's cell. The record demonstrates that on these occasions, the plaintiff failed to notify prison officials of his situation. Plaintiffs declined to pursue their requests for protective custody and returned to the general population during the period in which they were being assaulted. Plaintiff Marsh actually assisted in the rapes of two of the other plaintiffs by switching cells with them and not showing himself to the guards. Three of the plaintiffs failed to reveal themselves to guards when they were in the wrong cell; each subsequently was assaulted. Moreover, one of the plaintiffs' main contentions is that prison officials' failure to classify them as "passive" and to segregate them from violent prisoners led to their assaults. They claim that the defendant's policy of assigning inmates to cells at random put them at a risk of harm. The record demonstrates, however, that none of the assaults occurred in the plaintiffs' own cells at the hands of their randomly assigned cellmates. The jury could have concluded, based on this evidence, that many of the attacks would have occurred even if the defendant's conduct met constitutional standards.

The record further reflects that once plaintiffs did inform prison officials that they had been sexually assaulted (as opposed to simply being threatened), they were placed in administrative segregation or protective custody. No plaintiff ever was sexually assaulted while in administrative segregation or protective custody. From this evidence, the jury may have concluded that although the defendant's actions caused the first assault as to each, the plaintiffs' failure to seek protection was the cause in fact of all further assaults they faced.

As additional support for the nominal damages award, the jury could have concluded that plaintiffs failed to prove their damages for the injuries it did find to be caused by the defendant's wrongful conduct. In addition to holding that a jury award of

damages must be "shocking" to be inadequate, we also believe that credibility questions concerning damages should be decided at the district court level. We have stated that:

> [I]nadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders . . . .

Taken Alive v. Litzau, 551 F.2d 196, 198 (8th Cir. 1977) (citing *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961)). The court went on to state:

> An appellate court should be extremely hesitant to overturn a jury verdict which includes damages for pain and suffering . . . . There is no precise or exact measuring stick for calculating general damages for pain and suffering. Although the jury should not pick a figure out of the air, exact compensation for pain and suffering is impossible.

Id.

These dictates apply with particular force to the present case. In order to recover compensatory damages in a § 1983 action, the plaintiff must prove them. *See Carey*, 435 U.S. at 263; Cowans, 862 F.2d at 700. In this case, nearly all of the evidence of the plaintiffs' damages consists of their own testimony. The issue of damages thus depends upon the credibility of witnesses, a matter particularly within the province of the jury.

We first note that an extensive review of the record demonstrates that none of the plaintiffs provided medical testimony regarding the extent of their physical injuries. Similarly, medical proof of the plaintiffs' emotional distress was limited to the

introduction of one-page medical services statements in which a prison psychologist (not a medical doctor) stated merely that two of the plaintiffs, Marsh and Ledferd, suffered from "post traumatic stress disorder," and that he had prescribed sleeping pills for them. This psychologist did not testify. Plaintiffs provided no testimony explaining what "post traumatic stress disorder" is or what its effects are. Moreover, the evidence regarding Corder's and French's injuries is even more sparse. They provided no medical evidence whatsoever supporting either their physical or emotional injuries.

Plaintiffs' medical expert, Dr. Ronald Sable, likewise provided little support concerning the extent of the plaintiffs' damages. He testified that he had not examined any of the plaintiffs. Thus, he could not state whether these plaintiffs were in fact damaged by their experience. Moreover, his testimony concerning rape trauma syndrome does not even give the jury enough information to conclude whether plaintiffs suffered from its effects.[14] Thus, after hearing the plaintiffs' sole medical expert at trial, the jury had no basis from which to conclude that plaintiffs were damaged. The record is bereft of any medical testimony either by hypothetical or otherwise based upon reasonable medical probability.

When medical testimony is absent, proof of the nature and extent of a plaintiff's injuries necessarily depends upon the credibility of the plaintiff's testimony. In addition to the medical testimony recited above, the jury heard the following concerning the plaintiffs' injuries:

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[14] Dr. Sable's testimony concerning rape trauma syndrome consists solely of the following: "There can be what's generally described as the rape trauma syndrome, which includes emotional, cognitive and psychological consequences." Tr., Vol. III at 56. He also testified that rape can cause physical injury and infection. *Id.* Because neither he nor any medical doctor examined the plaintiffs at the time of any of the attacks, there is no medical evidence that the plaintiffs received physical injury.

> Marsh stated that he suffered from ulcers and lack of sleep following repeated assaults by Stapleton. III Trial Transcript at 182 [hereinafter Tr.]. A prison psychiatrist prescribed Marsh sleeping pills. III Tr. at 196. Inmate Ivron Butler testified that he observed Marsh throwing up several times after being raped. II Tr. at 133. Ledferd described suffering from anal bleeding for a week and a half after Stapleton raped him, and stated that he suffers from torment and depression continuously. III Tr. at 124-25. Corder stated that he was unable to urinate or defecate, and lost his appetite after Stapleton raped him; he also testified that he suffered headaches after Stapleton hit him on the head during an assault. III Tr. at 194. French stated that Anderson beat him during an assault. III Tr. at 157. Inmate Doyle Kirkman stated that French broke down in tears while describing his ordeal. II Tr. at 161.

Dissenting op. of Bright, J., *infra* at __. Given the lack of medical testimony, the jury's determination of the extent of the plaintiffs' injuries must have depended upon their evaluation of this testimony.

There is considerable evidence in the record from which the jury could have concluded that the plaintiffs' testimony concerning their injuries was not credible and could have disbelieved the extent of their injuries. Despite the plaintiffs' claims regarding the extent of their mental torment and suffering, all failed promptly to report the incidents. Marsh even asked to room with his assailant after being attacked. All of the plaintiffs left administrative segregation and returned to the general population. When they did so, each signed a statement providing that "I do not feel my safety to be threatened or my life to be in danger. Therefore, no, I do not need protective custody."[15] Moreover,

[15] Each plaintiff admitted on cross-examination to signing the statements. *See* cross-examination of Hershel Marsh, Tr., Vol. II at 202; cross-examination of Frank Ledferd, Tr., Vol. III at 139; cross-examination of Jay French, Tr., Vol. III at 166, 168; cross-examination of David Corder, Tr., Vol. III at 216.

three of the plaintiffs stated that they did not want to check into administrative segregation because they would lose radio and television privileges and would have limited spending money.[16] From this evidence, the jury reasonably could have disbelieved the plaintiffs' testimony concerning the injuries received from those attacks it found to be caused by the defendant. Because the proof of the plaintiffs' injuries is limited almost solely to their own testimony, and thus the issue of damages limited almost exclusively to that of credibility, this court should not upset the determination of the jury and the trial court, which were in a much better position to determine the credibility of witnesses.

After concluding that the jury could have disbelieved the plaintiffs' testimony regarding the extent of their injuries, the award in this case is not aberrant. This court has approved nominal damages in other cases in which the plaintiffs suffered apparently quantifiable harm. *See Warren v. Fanning*, 950 F.2d 1370 (8th Cir. 1991) (nominal damage award upheld where denial of proper medical treatment resulted in surgical removal of toenails, surgical removal of rod in leg, and surgery on heel), *petition for cert. filed*, No. 91-8221 (U.S. Mar. 27, 1992); *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (nominal damage award appropriate when guard slammed door on inmate's hand resulting in pain, swelling and bruising if jury unable to place monetary value on harm; jury free to disbelieve the extent of swelling or other compensable injury); *Williams v. Mensey*, 785 F.2d 631, 639 (8th Cir. 1986) (nominal damages not inadequate as a matter of law when the plaintiff complained that he had been punched in the head with enough force to hit the wall and claimed to suffer headaches, back pain, and blurred vision as a result); *cf. Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984) (nominal damage award to plaintiff stabbed thirty-two times by

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[16] *See* cross-examination of Hershel Marsh, Tr., Vol. II at 21317; cross-examination of Jay French, Tr., Vol. III at 176; cross-examination of David Corder, Tr., Vol. III at 203-09.

five other prisoners not so inadequate to require its reconsideration in the absence of a motion for a new trial). Although we do not necessarily equate the pain and suffering of a rape victim with the injuries suffered by plaintiffs in the foregoing cases, given that the jury could reasonably refuse to believe the plaintiffs' testimony regarding the extent of their injuries, we do not find the present award "shocking" or a "plain injustice."

B. Equitable Relief [17]

1. Declaratory Relief

Plaintiffs claim that the district court erred by denying their motion for declaratory relief. They argue that, because the jury found for them on the liability issue, they are entitled to declaratory relief.

In order for the court to have jurisdiction to grant declaratory relief, there must be an "actual controversy" between the parties. *Caldwell v. Gurley Ref. Co.*, 755 F.2d 645, 648 (8th Cir. 1985). The test is whether there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Id.* at 649.

In this case, there was no actual controversy left to resolve through declaratory relief when that issue was submitted to the district court. The plaintiffs' only requested declaratory relief mirrored what the jury was told it must find in order to hold the

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[17] After trial, Jim Purket replaced Denis Dowd as Superintendent of FCC. Plaintiffs moved pursuant to Fed. R. Civ. P. 25(d)(1) to add Purket as a party defendant in his official capacity. Because we find that plaintiffs are not entitled to equitable relief, we affirm the district court's denial of this motion.

defendant liable.[18] The jury verdict, therefore, amounts to an implicit declaration of the same things that plaintiffs are requesting in their motion for declaratory relief. Plaintiffs admitted this in oral argument.[19] Once the jury's verdict was reached, declaratory relief could not change or clarify any legal relationship between plaintiffs and defendant. *See International Wood Processors v. Power Dry Inc.*, 593 F. Supp. 710, 736 n.15 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986) ("[G]ranting declaratory relief would serve no useful purpose at this stage because the legal obligations of the parties have been clarified by the jury's resolution of the legal claims."). Therefore, the issue is moot and neither this court nor the district court has jurisdiction to grant declaratory relief.

For the foregoing reasons, we affirm the district court's denial of plaintiffs' motion for declaratory relief.

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[18] Plaintiffs' requested jury instruction concerning liability provided that in order for the jury to find in favor of the plaintiffs, it must find:

> One, the plaintiff was subjected to one or more sexual attacks by prisoners in Farmington Correctional Center. Two, defendant knew or should have known the prisoners, such as plaintiff, were subject to a pervasive risk of sexual attack. Three, defendant failed to respond reasonably to the risk of such attacks. Four, the defendant's conduct was a proximate cause of the plaintiff's injury. And five, the plaintiff was injured.

Tr., Vol. V at 48. Plaintiffs' requested declaratory relief was identical to the liability jury instruction. Appellants' App. at 28, Pls.' Mem. in Support of Their Motion for Declaratory and Injunctive Relief.

[19] At oral argument, Judge Magill commented that the only victory that plaintiffs can claim is $4, and that's not very much of a victory. Plaintiffs' attorney responded that they had $4 and *a declaration implicit in the verdict* that a very important constitutional right was denied these men.

2. Injunctive Relief

Corder claims that the district court erred in denying his motion for injunctive relief.[20] In order for him to obtain injunctive relief, he must show "some substantial likelihood that past conduct alleged to be illegal will recur." *Sterling v. Calvin*, 874 F.2d 571, 572 (8th Cir. 1989). A showing that unconstitutional practices have taken place in the past is not enough. He must show that such practices are likely to affect him in the future. *See id.* Corder has not made any such showing. Although he claims that he is still subject to *threats* from fellow inmates, Appellants' App., Tab 7 p. 51 ¶ 46, Pls.' First Amended Compl., he does not claim that he is still subject to sexual assault. The testimony was that none of the plaintiffs has been sexually assaulted since January 1, 1989. Trial Tr., Vol. I pp. 25 et seq.; Appellants' App., Tab 7, Pls.' First Amended Compl. In fact, the evidence demonstrates that Corder feels secure enough from assault that he filed a grievance about a policy change that was apparently designed to prevent such assaults from occurring[21] Corder thus has not shown a substantial likelihood that the unconstitutional practices he complained about at trial will recur or affect him in the future. The injunctive relief Corder requests, therefore, will only benefit other inmates, particularly new inmates. Injunctive relief, however, must be carefully tailored to remedy the alleged specific harm to the parties involved. *See United States v. Articles of Drug*, 825 F.2d 1238, 1247-48 (8th Cir. 1987); *see also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337 (lst Cir. 1989), *cert. denied*, 496 U.S. 937 (1990) (classwide relief appropriate only

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[20] We address this issue only as it relates to Corder because he is the only plaintiff still incarcerated. The claims for injunctive relief of the other three plaintiffs, who have been released from prison, are moot.

[21] See Corder Testimony, Trial Tr., Vol. III at 218-19. Prison policy changed to require inmates to keep their doors open during open wing period, when free movement of inmates within the wing is allowed.

where there is a properly certified class). This is not a class action. Corder, therefore, is not entitled to the injunctive relief he requests.

In addition, much of the injunctive relief Corder requests in this case is beyond the power of the superintendent of an individual institution to grant. He requests, *inter alia*, a transfer to the Missouri Eastern Correctional Center,[22] orientation programs on sexual assaults for new inmates, a different system to classify and segregate some inmates from others, and no temporary stay in administrative segregation before entering protective custody. All these aspects of institutional life are governed by a centralized authority, the Missouri Department of Corrections, and the superintendent has no power to change centralized decisions. Appellee - Cross-Appellant's Supplemental App., Tab 3 at 14-16, Aff. of George A. Lombardi, Director of Adult Institutions for the Missouri Department of Corrections and Human Resources.

For the foregoing reasons, we affirm the district court's denial of the motion for injunctive relief.

C. Denial of J.N.O.V.

Dowd argues that the district court erred when it denied his motion for j.n.o.v. because plaintiffs failed to prove that they faced a pervasive risk of sexual assault at FCC. He contends that plaintiffs failed to establish that sexual assaults occurred at FCC with such frequency as to reasonably apprise FCC officials of the risk of attack. The jury found that Dowd violated plaintiffs' Eighth Amendment right to be free from cruel and unusual punishment by knowingly or recklessly subjecting plaintiffs to a pervasive risk of sexual assault. *See* Jury Instruction 11, *supra*; *see also Bailey v. Wood*, 909 F.2d 1197, 1199 (8th Cir. 1990); *Vosburg*, 845 F.2d at 765; *Martin v. White*, 742 F.2d 469, 474

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[22] *See supra* Part I. at ___ n.11.

(8th Cir. 1984); *cf. Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991).

In reviewing the district court's denial of Dowd's motion for j.n.o.v., we apply the same standard as the district court. *Morgan*, 897 F.2d 945, 948 (8th Cir. 1990) (citing *Cleverly v. Western Elec. Co.*, 594 F.2d 638, 641 (8th Cir. 1979) (per curiam)). Therefore, we must consider the evidence in the light most favorable to the prevailing party (the plaintiffs), assume that the jury resolved all conflicts in the evidence in favor of the plaintiffs, assume as proved all facts that the plaintiffs' evidence tends to prove, give the plaintiffs the benefit of all favorable inferences that can reasonably be drawn from the facts proved, and affirm the denial of the motion if reasonable persons could differ about the conclusions to be drawn from it. *Id.* Generally, "only the evidence favoring the nonmoving party (usually, as here, the plaintiff) should be considered." *Id.* (quoting *Dace v. ACF Indus.*, 722 F.2d 374, 376 (8th Cir. 1983)).

When we consider the evidence presented at trial in this case under this stringent standard of review, we find that there was sufficient evidence to support the jury's finding that Dowd subjected plaintiffs to a pervasive risk of sexual assault in violation of their Eighth Amendment rights. Plaintiffs presented evidence that there were at least 100 sexual assaults reported at FCC during a three-year period. During that same time frame, however, there were almost no sexual assaults assigned to the prison investigator for investigation, and Dowd never referred even one sexual assault for prosecution. There was no warning to prisoners about the risk of sexual assault. The prison personnel had received no training or instructions about how to handle sexual assaults or how to prevent them. Prisoners were assigned to general population at random, with no segregation based on their vulnerability to assault. Dr. Sable, plaintiffs' expert, testified that this practice was reckless conduct. Plaintiffs introduced an affidavit at least implying that Dowd knew plaintiffs, and

others like them, were vulnerable. Protective custody was not readily available to inmates because they were required to spend extended periods of time in administrative segregation before being admitted to protective custody. Dr. Sable testified that this is a significant barrier to inmates requiring protection. Given this evidence presented by plaintiffs, we cannot say the district court erred by denying Dowd's motion for j.n.o.v.

Dowd also claims that he was entitled to j.n.o.v. because as a state actor he was protected by qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that defendants will be protected by qualified immunity in § 1983 suits only if their actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This court has clearly held that prisoners have a constitutional right to be free of sexual attacks by other inmates and that a prison official is liable if they are deliberately indifferent or act with reckless disregard of that right. *Vosburg*, 845 F.2d at 765-66; *Martin*, 742 F.2d at 474. Because this is a clearly established constitutional right about which Dowd either knew or should have known, Dowd was not entitled to qualified immunity in this case. The district court did not err in denying his motion for j.n.o.v. on this basis.

D. Attorneys' Fees

Dowd claims that the district court abused its discretion in awarding plaintiffs' counsel $94,680 in attorneys' fees. Dowd argues that because plaintiffs failed on the issue of damages, they achieved limited success. Therefore, the district court should reduce the award to reflect the limited success achieved by plaintiffs. Dowd also argues that the district court failed to consider that one of the two plaintiffs' attorneys was inexperienced and attended all depositions and proceedings without

doing anything, thereby unnecessarily increasing the hours plaintiffs' attorneys spent on this case.[23]

A district court has a "special understanding" of the complexity of a case, and therefore is best equipped to determine the reasonableness of the hours expended by counsel. *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1270 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988) (citing *Moore v. City of Des Moines*, 766 F.2d 343, 345-46 (8th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986)). We will overturn a district court's award of attorneys' fees only if the district court abused its discretion. *Id.*

In this case, the district court awarded plaintiffs $94,680 in attorneys' fees based on 946.9 hours expended at a reasonable hourly rate of $100.[24] When determining the amount of attorney's fees, the district court must focus on the "significance of the

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[23] The argument before us is that the attorneys' fees should be reduced. This is a different issue from the question of whether a plaintiff can get attorneys' fees when they are awarded only nominal damages at trial. The circuits are split on this issue. *Compare Domegan v. Ponte*, No. 91-1625, 1992 WL 188811 (1st Cir. Aug. 10, 1992); *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir. 1992) (per curiam) (nominal damages make plaintiff prevailing party for purposes of obtaining attorneys' fees pursuant to 42 U.S.C. § 1988); *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991) (same); *Coleman v. Turner*, 838 F.2d 1004 (8th Cir. 1988) (per curiam) (same); *Nephew v. City of Aurora*, 830 F.2d 1547 (10th Cir. 1987) (en banc) (same), *cert. denied*, 485 U.S. 976 (1988); and *Garner v. Wal-Mart Stores Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987) (same) *with Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991) (nominal damages do not make plaintiff prevailing party for purposes of obtaining attorneys' fees pursuant to 42 U.S.C. § 1988), *cert. granted*, 112 S. Ct. 1159 (1992). Because this issue is not before us in this case, we do not address it.

[24] The court disallowed .1 hour because it was paralegal time and not compensable in attorneys' fees. Dowd does not dispute that plaintiffs' attorneys spent 946.9 hours working on the claim on which they succeeded and claims related to it.

overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). The Supreme Court has also stated that "[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality) (citations omitted). We believe that the district court properly followed these mandates. First, the magistrate judge specifically considered the level of success in calculating his award. The magistrate judge stated that "[a]lthough at first blush such an award might seem excessive in light of the nominal damages awarded, the measure of success in Civil Rights litigation of this type is not limited to the monetary damage award. There is inherent value in a determination that ones [sic] constitutional rights have been violated. Accordingly, this court finds that plaintiffs' attorneys are entitled to fees in the amount of $94,680." *Corder v. Dowd*, No. 89-276C(6), slip op. at 4 (E.D. Mo. Sept. 19, 1990). The record reflects that the litigation did serve the interest of prisoners other than the plaintiffs, as the defendant subsequently instituted some of the safety measures requested by the plaintiffs.[25] *Cf. Rivera*, 477 U.S. at 585-86 (Powell, J., concurring).

The court also considered several other factors, including the complex nature of the litigation, the quality of the work, the zealous manner in which plaintiffs' attorneys pursued their cause, and the effect this litigation had on the attorneys' small firm. *Id.* at 3. In addition, the court awarded attorneys' fees to counsel based on a flat hourly fee of $100 even though plaintiffs'

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[25] Specifically, the FCC instituted a new policy requiring that the doors of all prisoners be open during its "open wing" period.

lead counsel presented substantial evidence supporting a fee of $175 an hour for his time. After reviewing the district court's calculations and the evidence submitted by plaintiffs, we cannot find that the district court abused its discretion in this case.

E. Instruction

Dowd argues that the instruction on the standard to determine whether he violated the Eighth Amendment was erroneous. The instruction read as follows:

> Prison officials may be liable for violation of a prisoner's civil rights, where they are deliberately indifferent to a prisoner's constitutional right to be free from sexual attacks by other inmates, if they actually intend to deprive them of that right, or if they act with careless disregard of this right. Reckless disregard of the prisoner's right to be free from sexual attacks by other inmates may be shown by the existence of a pervasive risk of harm to inmates from other prisoners and failure of prison officials reasonably to respond to that risk.

We have clearly held that a prison official may be liable for a violation of a prisoner's right to be free from sexual attacks by other inmates if that official is deliberately indifferent to that right or acts with reckless disregard for the right. *Vosburg*, 845 F.2d at 765-66; *Martin*, 742 F.2d at 474. Dowd argues that *Wilson*, 111 S. Ct. at 2326-27, has changed the law and he should not have been subject to liability for reckless disregard. Dowd contends that he is therefore entitled to a new trial on liability. Dowd argues this issue for the first time on appeal. He did not object to the instruction at the time of trial. We do not address this issue because it has not been preserved and, therefore, is not before us. *See Diamonds Plus. Inc. v. Kolber*, 960 F.2d 765, 768 (8th Cir. 1992); *United States v. Standefer*, 948 F.2d 426, 430 (8th Cir. 1991).

III.

For the foregoing reasons, we affirm the district court on all counts.

BEAM, Circuit Judge, concurring specially.

I agree with much that is said in Judge Bright's dissent and would agree to reverse and remand this matter for a new trial on all issues--liability, causation, and damages. I will not agree, however, under the circumstances of this case, to treat one party unfairly in an attempt to treat the other fairly, especially when justice can be done for both. Accordingly, with reluctance, I concur in the result reached in the opinion prepared by Judge Magill.

First, I disagree with both opinions that the jury verdict stands for the proposition that each plaintiff was raped at least once. This conclusion is speculative and unsupported by the actions taken by the jury.

The plaintiffs contend that a jury verdict in favor of each plaintiff proves at least one rape because of the following instructions:

> If you find that any one or more of the Plaintiffs consented or was not forcibly compelled to engage in any alleged *sexual conduct* with other inmates, then your verdict must be for the Defendant.
>
> . . . .
>
> Your verdict must be for any of the Plaintiffs and against the Defendant, Denis Dowd, if you find that: One, the Plaintiff was subjected to one or more *sexual attacks* by prisoners in Farmington Correctional Center. Two, Defendant knew or should have known the prisoners, such as Plaintiff, were subject to a pervasive risk of *sexual attack*. Three, Defendant failed to respond reasonably to the risk of *such attacks*.

> Four, the Defendant's conduct was a proximate cause of the Plaintiff's injury. And five, the Plaintiff was injured.

Appellants' Reply and Answer Brief at 7 & n.2 (emphasis added) (citations omitted).

The record contains much evidence concerning rape, threatened rape, and physical and mental abuse of a sexual and nonsexual nature short of rape. All of this activity could properly have been understood by the jury to constitute "sexual conduct," "sexual attacks," and "sexual assault,"[1] the various terms used by the trial court in its instructions. Further, in accordance with our opinion in *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988) the jury was told "injury or damage[s] . . . can include . . . physical pain and discomfort, and any emotional and mental harm . . . suffered, including fear, humiliation and mental anguish." Trial Transcript Vol. V at 47-48.

Thus, while I agree, as stated in *Cowans*, that harm of some kind is a relevant element in a determination that a constitutional violation has occurred, a finding of liability under the verdict director instruction given in this case does not necessarily establish that an actual rape occurred involving each plaintiff, or any plaintiff for that matter.

Second, and of perhaps more importance, the very nature of an Eighth Amendment claim makes partial remand for consideration of only damages improper, especially under the circumstances of this particular dispute. It is elemental that plaintiffs must have carried the burden of proof of the issues of liability, causation, and damages. Because, as discussed, proof of liability in an Eighth Amendment context requires a finding of some element of harm, all issues—liability, causation, and damages—

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[1] This term was used by the district court in its instruction outlining the nature of plaintiffs' allegations of constitutional violations. Trial Transcript Vol. V at 44.

are inextricably intertwined. Thus, a remand to consider damages alone is constitutionally suspect. The practice of retrial on one issue is constitutional, but only if the issue remanded is "so distinct and separable from the others [in the trial] that a [new] trial of it alone may be had without injustice." *Gasoline Prod. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). In this circuit, a district court in considering a trial on less than all of the issues must determine that (l) the issues are clearly distinct; (2) the bifurcation will not prejudice either party; and (3) the action will result in judicial economy. *See Taylor v. RayGo, Inc.*, 680 F.2d 1223, 1224 (8th Cir. 1982). If the issues are not clearly separable, a bifurcation of issues is an abuse of discretion. *O'Dell v. Hercules Inc.*, 904 F.2d 1194, 1202 (8th Cir. 1990). Bifurcation must be very cautiously considered where the injury itself, as here, has an important bearing on liability. *Id.* (citing *Hosie v. Chicago North Western R.R.*, 282 F.2d 639, 643-44 (7th Cir. 1960)), *cert. denied*, 365 U.S. 814 (1961). I can see no reasoned way for this court to deviate from these principles in making a decision to remand this case for retrial on damages only.

As discussed, under the evidence adduced and instructions given, the finding of sufficient harm to impose liability and the finding of only nominal damages as a result of the breach of duty are not necessarily inconsistent. *See, e.g., Cowans*, 862 F.2d at 700 (if jury finds cruel and unusual punishment--which finding involves an element of harm--nominal damages are proper if jury is unable to place a monetary value on harm suffered). Even so, the result here points toward a compromise verdict. In other words, the verdict strongly suggests a recognition by the jury of the inter-relationship of the issues and a trade-off between liability, causation, and damages. In the face of a compromise verdict, courts have never found the issues to be sufficiently separable to approve a retrial on one issue only. *See, e.g., Smallwood v. Dick*, 761 P.2d 1212, 1216 (Idaho 1988). *See*

generally, Jack B. Weinstein, *Routine Bifurcations of Jury Negligence Trials*, 14 Vand. L. Rev. 831, 842 (cited in the 1966 amendment notes to Fed. R. Civ. P. 42(b)).

The possibility of a compromise verdict leads to my third concern, a problem neither the majority nor the dissent sufficiently discusses. The jury instruction on Eighth Amendment liability was flawed. Granted, there was not an adequate objection to the improper instruction by the defendant at trial and, I would usually require the defendant to live with any untoward result. However, the faulty instruction becomes an overriding concern when considering a remand for retrial, especially on one issue only.

The improper liability instruction was given twice, in differing versions. Both versions were inconsistent with proper Eighth Amendment jurisprudence. It was first stated as follows:

> Prison officials may be liable for violation of a prisoner's civil rights, where they are deliberately indifferent to a prisoner's constitutional right to be free from sexual attacks by other inmates, if they actually intend to deprive them of that right, or if they act with *careless disregard of this right*. Reckless disregard of the prisoner's right to be free from sexual attacks by other inmates may be shown by the existence of a pervasive risk of harm to inmates from other prisoners and failure of prison officials reasonably to respond to that risk.

Trial Transcript Vol. V at 45. Later, the judge, stating that he had misread the instruction, said:

> Prison officials may be liable for a violation of a prisoner's civil rights where they are deliberately indifferent to a prisoner's constitutional right to be free from sexual attacks by other inmates; or if they actually intend to deprive him of that right; or if they act with *reckless disregard of that*

> *right*. Reckless disregard of a prisoner's right to be free from sexual attacks by other inmates may be shown by the existence of pervasive risks of harm to inmates from other prisoners and the failure of prison officials to reasonable--reasonably respond to that risk.

Trial Transcript Vol. V at 51.

Neither version of the instruction defines a standard of care from which an Eighth Amendment violation may emerge.

> "To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety .... It is *obduracy and wantonness* not inadvertence or error in good faith, that characterize the conduct prohibited by the cruel and unusual punishments clause."

Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (some emphasis omitted) (quoting *Whitley v. Albers*, 475 U.S. 312 (1986)).[2] The instructions given allowed the jury to find liability from acts or omissions not encompassed within the *Wilson v. Seiter* test. So, the dissent would solve a purported damages error on the part of the jury while allowing error on the part of the trial judge to stand untouched. And, although the dissent may argue that it has no duty to rectify an error not brought to the attention of the trial court, it readily seeks to reverse a finding of only $1.00 nominal damages when the jury was told, certainly without objection from the plaintiffs and probably at the request of the plaintiffs, that

> [i]f you find that plaintiff is entitled to a verdict, but do not find that plaintiff has sustained actual damages, then you

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[2] I realize that some of our post-Seiter cases establish "reckless disregard" as the standard of care in Eighth Amendment claims. *See Elliott v. Byers*, slip op. no. 91-3229 (8th Cir. Sept. 24, 1992); *Falls v. Nesbitt*, 966 F.2d 375 (8th Cir. 1992). In my view, a finding of obduracy and wantonness requires more; certainly more is required than an official failing to respond "reasonably" to a risk of harm, as stated in both instructions.

must return a verdict for that plaintiff in amount of $1.00 as nominal damages.

Trial Transcript Vol. V at 49. I refuse to join in such an unbalanced approach. Accordingly, I concur in the result reached by Judge Magill.

BRIGHT, Senior Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, LAY, Senior Circuit Judge, McMILLIAN, WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, join, concurring in part and dissenting in part.

We concur in the rejection of the cross-appeal by Denis Dowd, Superintendent of the Farmington Correctional Center (FCC). However, we would reverse on the appeal by Frank A. Ledferd, David Corder, Hershel Marsh and Jay M. French [hereinafter plaintiffs-appellants] and grant them a new trial on damages. Inasmuch as the Court affirms the nominal damages award, we approve of the award of attorneys' fees made by the trial court.

The plaintiffs-appellants in this case are prisoners who bring this § 1983 action, seeking money damages and equitable relief against former Superintendent Dowd and four members of his staff for their failure to protect them from the savage and heinous acts of homosexual rape in prison. The jury, although finding in favor of plaintiffs-appellants on liability, awarded each only $1.00.

By a slim seven to six vote, this court affirms the trial court's refusal to grant a new trial on damages.[1] The Court, in our view, engages in speculation, not supported by the record, the instruc-

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[1] The panel majority (Judges Lay and Bright) voted to reverse the district court. Judge Magill, dissenting, voted to affirm. *Ledferd v. Dowd*, Nos. 90-2090, 90-2091 (8th Cir. Feb. 6, 1992), *vacated on grant of reh' g en banc* (Apr. 1, 1992).

tions or the parties' contentions in their arguments to the jury, in approving a verdict denying plaintiffs-appellants actual damages for the rapes.

We dissenters, following well-reasoned policy developed by courts in this circuit relating to control of prison brutality, believe a shocking injustice has been done in this case; that no justification exists for the jury's award denying the plaintiffs-appellants actual damages. Consequently, we would remand for a new trial on damages alone and instruct the trial court to consider injunctive relief.

The principal issue on appeal is whether the trial court erred in denying the plaintiffs-appellants' motion for a new trial. In our opinion, it did. We differ here with the principal opinion[2] because we feel damages resulting from a rape—any rape—can never be valued at only $1.00, particularly in this case, where defendant Dowd at trial never denied the rapes occurred, but asserted they were not the warden's responsibility.

I.

This circuit is not unfamiliar with prison rape and the attending responsibilities prison administrators have to curb such conduct. In 1969, then Chief District Judge J. Smith Henley ruled that cruel and unusual conditions existed at the Cummins Farm Arkansas Penitentiary. Commenting on the problem of sexual assaults at the prison, he wrote:

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[2] In light of the differences in views of the members of this Court represented in the several opinions -- six votes to affirm the district court per Judge Magill's opinion; six votes to grant a new trial on damages alone in this dissenting opinion and including the separate dissent of Judge Morris Sheppard Arnold; and one separate concurrence by Judge Beam joining the result reached in Judge Magill's opinion, but stating he would reverse and remand for a new trial on all issues -- this dissent refers to Judge Magill's opinion as the principal opinion in this case.

An inmate who is physically attractive to other men may be, and frequently is, raped in the barracks by other inmates. No one comes to his assistance; the floor walkers do not interfere; the trusties [prisoners entrusted to guard other prisoners] look on with indifference or satisfaction; the two free world people on duty appear to be helpless.

Inmates who are passively homosexual are called "punks." There are varieties of "punks," including the "pressure punks" who will engage in homosexual acts if more or less pressure is put upon them to induce or compel them to do so.

In an effort to protect young men from sexual assaults, they are generally assigned to the two rows of cots nearest the front bars of the barracks, which portion of the barracks is called "punk row." It appears, however, that if would-be assailants really want a young man, his being assigned to the "row" is no real protection to him.

To the extent that consensual homosexual acts take place in the barracks, they are not carried out in any kind of privacy but in the full sight and hearing of all of the other inmates.

Sexual assaults, fights, and stabbings in the barracks put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night. That practice, which is of doubtful value is called "coming to the bars" or "grabbing the bars." Clearly, a man who has clung to the bars all night is in poor condition to work the next day.

Holt v. Sarver, 309 F. Supp. 362, 377 (E.D. Ark. 1970) (Holt II), *aff'd*, 442 F.2d 304 (8th Cir. 1971).[3] After reviewing the conditions at the penitentiary, Judge Henley observed:

> For the ordinary convict a sentence to the Arkansas Penitentiary today amounts to a banishment from civilized society to a dark and evil world completely alien to the free world, a world that is administered by criminals under unwritten rules and customs completely foreign to free world culture.

Id. at 381. Judge Henley ordered injunctive relief to rectify the unconstitutional conditions, concluding:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Id. at 385.[4]

Fifteen years later, Judge Ross in *Martin v. White*, 742 F.2d 469 (8th Cir. 1984) addressed the problem of sexual assaults at the Missouri Training Center, stating:

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[3] The complete history of this case reads as follows: *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (*Holt II*), aff'd, 442 F.2d 304 (8th Cir. 1971), *further hearings*, *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973) (*Holt III*) (granting injunctive relief but withdrawing supervisory jurisdiction), *rev'd as to withdrawal of jurisdiction*, *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974), *further hearings*, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (1977), *aff'd*, *Hutto v. Finney*, 437 U.S. 678 (1978).

[4] Both this court and the Supreme Court affirmed Judge Henley. *See supra* note 2.

> In this case we deal with a subject matter which has become a national disgrace in some of our nation's prisons. We speak, of course, of the inability or unwillingness of some prison administrators to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates.

Id. at 470. Judge Ross concluded: "Subjecting prisoners to violent attacks or sexual assaults, or constant fear of such violence, shocks modern sensibilities and serves no legitimate penological purpose. We reject as below any level of decency the theory that sexual or other assaults are a legitimate part of a prisoner's punishment." *Id.* at 474 (citations omitted).

II.

Here, the jury's verdict established that Dowd operated FCC in reckless disregard for the prisoners' constitutional rights by failing to take proper steps to prevent sexual assaults when he knew such assaults were occurring. The evidence is summarized in the principal opinion. *Ante*, at 3-14. We also adopt the statement of facts from the panel opinion. *Ledferd v. Dowd*, Nos. 90-2090, 90-2091, slip op. at 3-8 (8th Cir. Feb. 6, 1992), *vacated on grant of reh'g en banc* (Apr. 1, 1992). The evidence on liability must be taken favorably to support the determination in favor of the plaintiffs-appellants on liability. Each unquestionably suffered physical and emotional damages as a result of the rapes caused by the defendant's recklessness. Indeed, it is conceded in the principal opinion that at a minimum:

> [t]he jury did find that the defendant's unconstitutional actions were the cause in fact of at least one of the attacks on each plaintiff. The jury could, however, have found the defendant's unconstitutional actions were not the cause in fact of many of the plaintiffs' injuries and still have returned a verdict for plaintiffs.

Ante, at 16. However, for some reason the jury decided that none of the plaintiffs-appellants should obtain actual damages.

Juries usually award nominal damages in cases where some question exists about whether a prisoner suffered any injury as a result of a constitutional violation, such as a denial of procedural due process. *E.g.*, *Graham v. Baughman*, 772 F.2d 441, 447 (8th Cir. 1985). However, in eighth amendment cases a jury must find that a defendant willfully or recklessly inflicted pain on the plaintiff to find for the plaintiff at all. *See Whitley v. Albers*, 475 U.S. 312, 320 (1986). Upon a finding of an eighth amendment violation, a plaintiff automatically receives at least nominal damages. *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). In such cases, a jury may award only nominal damages if it cannot place a monetary value on the victim's injuries. *Id.* at 700. This court commented in *Cowans* that nominal damages are, in effect, impossible in prison assault cases, for the injuries suffered in those cases are "too obvious to address." *Id.* at 700 (citing as examples *Vosberg v. Solem*, 845 F.2d 763 (8th Cir.), *cert. denied*, 488 U.S. 928 (1988); *Martin v. White*, 742 F.2d 469 (8th Cir. 1984)). A reasonable explanation for the jury awarding only nominal damages in this case is that the jury concluded it did not want to give tax dollars as a damages award to persons in prison. The failure to award damages, in our opinion, constitutes a miscarriage of justice.

III.

Before addressing the viewpoint of damages in the principal opinion of the Court, we think it appropriate to reiterate important undisputed evidence in the record. The record is replete with evidence the plaintiffs-appellants suffered terror and tremendous pain as a result of the rapes. Appellant Hershel Marsh, a nineteen-year-old, first-time offender testified that, within a couple of hours of arriving at FCC, inmate William Stapleton told him he was going to "fuck" him. Stapleton raped Marsh the

following night and repeatedly thereafter. Marsh testified that, as a result of the rapes, he suffered from ulcers and lack of sleep, for which a prison psychiatrist prescribed sleeping pills. Inmate Ivron Butler testified he observed Marsh vomiting numerous times after being raped by Stapleton.

Appellant Frank A. Ledferd, an eighteen-year-old, first-time offender, testified that, within two weeks of his arrival at FCC, he was raped by inmate Rob Johnson. Ledferd immediately sought protective custody, which prison officials denied because Ledferd refused to implicate Johnson. Shortly thereafter, Ledferd sought to straighten things out on his own and was advised by his cellmate to talk with Stapleton. Ledferd went to Stapleton's cell, where Stapleton immediately closed the door shut, told him to face the wall when the guard walked by, and then proceeded to rape him. Ledferd testified he suffered anal bleeding for a week and a half after Stapleton raped him. He also stated he continues to suffer torment and depression as a result of the attacks.

Appellant David Corder, a twenty-three-year-old, first-time offender, testified that Stapleton also raped him. Corder testified that, as a result of the rape, he had difficulty defecating and urinating, and lost his appetite. Corder also testified he suffered from headaches after Stapleton struck him on the head during an assault.

Appellant Jay M. French was twenty-one years old and, although he had been in jail, he had never been in prison before entering FCC. French testified inmate Darryl Saddler raped him and inmate George Anderson both raped and beat him. Inmate Doyle Kirkman testified French broke down in tears when French later described the ordeal to him.

The rationale in the principal opinion for denying actual damages is well capsulated in the contention "[t]he jury could, however, have found the defendant's unconstitutional actions were not the cause in fact of many of the plaintiffs' injuries and

still have returned a verdict for plaintiffs." *Ante*, at 16. To support such a theory, a scenario is surmised in which the jury might have selectively accepted a "this" fact and rejected a "that" fact from the testimony.

We note the obvious incredibility of the conclusions in the principal opinion on damages when we examine the record against the backdrop of counsel's presentation of arguments to the jury. First, plaintiffs-appellants' counsel stated that nobody, not even the defendant, denied the plaintiffs-appellants were sexually attacked by other prisoners. Trial Tr., Vol. V p. 15. Second, Dowd's counsel did not challenge that assertion. At trial, Dowd's attorney stated: "Denis Dowd . . . doesn't know if they were sexually assaulted." Trial Tr., Vol. V p. 24. Dowd's defense asserted a denial of any responsibility for the rapes[5] Third, defendant's counsel recognized that plaintiffs-appellants' case rested on

> The Victim Profile, The Attacker Profile. You heard their testimony that we're small, the attackers are big. We're white, the attackers are black. We're young, they were not. And we're in jail for armed robbery, sodomy, child abuse, deviate sexual assault, and burglary. These people were violent. You shouldn't have put us in with these violent people, because they would attack us and you should have known that.

Trial Tr., Vol. V p. 30. Counsel added, quoting denial by Dowd, "I don't believe that profile exists." Trial Tr., Vol. V p. 30.

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[5] Dowd's counsel stated in final argument "[i]t's an unfortunate fact of our society that sexual assaults can happen inside or outside of prisons. What you need to do, like Denis Dowd has done, is make the efforts that you can make to try keeping those to the absolute minimum." Trial Tr., Vol. V p. 26. He added, "I hope you don't believe for a minute that he callously disregarded or was recklessly indifferent to any sexual assaults at the prison." Trial Tr., Vol. V p. 27.

Contrary to the view expressed in the principal opinion that each plaintiff/appellant suffered only a single attack (although even a single attack justifies a substantial award), the jury's liability determination rested on uncontested proof of several rapes to each plaintiff/appellant. In this regard, we observe that Dowd did not segregate his defense on individual rapes, but denied responsibility for all that occurred. Moreover, the instruction referred to not one (*see ante*, at 17), but "one or more sexual attacks." Trial Tr., Vol. V p. 47.

Finally, the jury instructions belie the contention in the principal opinion that plaintiffs-appellants consented to sexual activity with fellow prisoners and, thus, are entitled only to nominal damages. The trial court instructed:

> If you find that any one or more of the plaintiffs consented or was not forcibly compelled to engage in any alleged sexual conduct with other inmates, then your verdict must be for the defendant. Consent or lack of consent may be expressed or implied. Forcible compulsion means physical force that overcomes reasonable resistance or a threat that places a person in reasonable fear of death or serious physical harm. When I use the word consent, I mean willingness, in fact, for conduct to occur. It may be manifested by action or inaction. It need not be communicated to the actor. If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.
>
> However, consent is not effective, if it is given under duress. Duress is constraint of another's will by which a person is compelled to give consent whether or not he is, in reality, willing to do so.

Trial Tr., Vol. V pp. 46-47. In light of the evidence and this instruction, the assertion in the principal opinion must be rejected.

In these circumstances, the award in this case shocks our senses. Even the assumption in the principal opinion, that the jury verdict may reflect that each appellant suffered only a single incidence of rape related to the unconstitutional conduct of Dowd, clearly warrants more than $1.00 in damages. That the brutal acts to which the plaintiffs-appellants were subjected are somehow on the *de minimis* end of a damages scale is, in our opinion, a sad commentary on this case. In light of our discussion above, the award is so inadequate as to constitute a plain injustice to the plaintiffs-appellants. *Nelson v. All American Life and Financial Corp.*, 889 F.2d 141, 152 (8th Cir. 1989). Accordingly, we would remand this case for a trial on damages.

IV.

In the principal opinion, Corder's plea for injunctive relief is denied on the grounds that Corder fails to present sufficient evidence indicating he is currently subject to a pervasive risk of attack. The district court summarily denied Corder's plea for injunctive relief. Because Corder's claim may have merit, particularly in light of other evidence uncovered in this case, we would remand to determine the scope of the threat faced by Corder,[6] and permit the district court, at its discretion, to reopen the record for additional evidence on this issue. Plaintiffs-appellants, including Corder who remains incarcerated, have made a number of reasonable requests for injunctive relief that deserve scrutiny. Corder specifically requested a training program for FCC employees to acquaint them with the risks of sexual assaults; the development of procedures to be followed with respect to sexual assault complaints; the development of an

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[6] After trial, Jim Purket replaced Denis Dowd as Superintendent of FCC. Plaintiffs moved pursuant to Fed. R. Civ. P. 25(d)(1) to add Purket as a party defendant being sued in his official capacity. The district court denied plaintiffs' motion without explanation. In our view, the district court should add Purket as a party defendant in order to consider injunctive relief.

orientation program to instruct new prisoners on their vulnerability to sexual assault; the development of a system to segregate predatory prisoners from more vulnerable prisoners; the establishment of protective custody cells which are available upon demand without the need for a preliminary stay in the punitive environment of administrative segregation; the implementation of a system which would protect prisoners from being held captive by other prisoners in a cell through the night; the establishment of procedures for the investigation and referral of sexual assault complaints to the local prosecuting attorney; the establishment of punishments for predatory prisoners; and the review of job assignments for predatory prisoners to ensure they have no contact with those seeking protective custody.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting, with whom McMILLIAN, Circuit Judge, joins.

I write separately to offer some observations appropriate to this case on the subject of damages for pain and suffering. Many lawyers evidently regard such damages as a kind of *tertium quid*, neither compensatory nor exemplary, simply an inscrutable sop to a tort victim. This attitude manifests itself in a number of odd ways. For instance, in Arkansas, the jury is not asked to discount an award for future pain and suffering to present value as it is with respect to other sorts of future damages. *See* AMI Civil 3d, 2201, 2205, 2206, 2207, 2209, 2219. Lawyers will also typically describe pain and suffering damages as "non-economic," further emphasizing the belief in their peculiar character. I suggest, too, that even economists have contributed to the confusion by calling those kinds of losses "non-pecuniary."

The truth is, however, that these kinds of awards are necessarily compensatory in nature. Their aim, therefore, must be to make the sufferer as content or happy as he or she would have been but for the compensable injury. Putting the matter this way usefully highlights the difficulty that juries may often have in

assessing damages for mental suffering. Without evidence of what kinds of things increase a particular plaintiff's subjective welfare, that is, his or her enjoyment of life, and without evidence of their cost, juries may feel that they are operating in the dark. It is a question whether, in a proper case, a court ought to direct a verdict on the question of damages for suffering because insufficient evidence on compensation has been presented, but no such request was made here; and, moreover, the custom seems to be to allow the question to go to the jury if there is sufficient evidence that pain and suffering actually occurred. This latter characteristic of current practice may simply be another manifestation of the inscrutable sop theory of pain and suffering damages. But there is another, perhaps more probable explanation for it. Jurors are regularly invited to use their common sense and the knowledge that they have in the ordinary affairs of life in arriving at their verdicts. Presumably, they are expected to arrive at an appropriate figure for compensating pain and suffering based on their experience with the general run of humanity. Besides, the correct measure of damages may well be the generic or market value of the pain suffered, though this is not well developed in the cases.

Because a number fixed on in this fashion is likely to be reasonable if it falls within rather broad and elastic limits, an award for pain and suffering will only rarely be disturbed on appeal, especially since we review the award by asking whether it is "shocking" or "monstrous," itself at least a partly subjective inquiry with each judge. (One wonders if there is some transcendent objective conscience that we are supposed to be consulting.) But in this case, the act that was committed was so horrendous that no reasonable person could have found that the plaintiffs' suffering was *de minimis*. It is true that the record on the extent of damages, not to mention what kind of compensation was appropriate, was not well developed. But zero is, in my mind, a wholly unacceptable number, indeed a shocking one, and I

would therefore remand for a retrial on the issue of damages. It is just possible that the jurors regarded the prisoners' life as so dismal and degraded before the rapes that the rapes did not diminish their enjoyment of it. But, in my view, no reasonable person could have come to that conclusion on this record. It is also possible that the jury meant to indicate by their verdict not that they had unanimously agreed to award the plaintiffs nothing, but, instead, that they were unable to agree on a particular number. But, even so, a new trial on damages would be required because the jury was hung. I do not read *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988), or *Warner v. Fanning*, 950 F.2d 1370 (8th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3258 (1992), as being inconsistent with or contrary to this last observation.

I therefore respectfully dissent from the judgment of the court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 90-2090/2091/2782EM

Frank A. Ledferd, et al.,
Appellants,

vs.

Denis Dowd, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

The motion of Appellants to consolidate case numbers 90-2090, 90-2091 and 90-2782EM is hereby granted.

The briefing schedule for these appeals is as follows:

Brief of Appellants	December 20, 1990
Brief of Appellee	January 21, 1991
Reply Brief (Corder, et al.)	February 20, 1991
Reply Brief (Dowd)	March 6, 1991

December 10, 1990

Order Entered Under Rule 27B(a):
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2090/2091/2782EM

Frank A. Ledferd, et al.,
Appellants,

vs.

Denis Dowd,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

The suggestion for rehearing en banc is granted. The opinion and judgment of this Court filed on February 6, 1992, are vacated.

The parties will be given directions in due course as to the submission of this case to the Court en banc.

April 1, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-276C(6)

DAVID CORDER et al.,
Plaintiff,

v.

DENNIS DOWD,
Defendant.

ORDER

This matter is before the court on plaintiffs' motion for attorney's fees. Plaintiffs brought an action under 42 U.S.C. § 1983 alleging violation of plaintiff's constitutional rights. On March 30, 1990, this court entered judgment in favor of plaintiffs, Ledferd, Corder, Marsh and French and against defendant Dennis Dowd in the amount of $4.00. On April 18, 1990, a claim for attorneys fees was timely filed pursuant to 42 U.S.C. § 1988 and local Rule 30.

IT IS HEREBY ORDERED that attorney's fees in the amount of $94,690.00 are awarded to plaintiffs' attorneys pursuant to 42 U.S.C. § 1988.

/s/Robert Kingsland
Robert Kingsland
UNITED STATES MAGISTRATE

Dated: September 17, 1990

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-276C(6)

DAVID CORDER et al.,
Plaintiff,

v.

DENNIS DOWD
Defendant.

MEMORANDUM

This matter is before the court on plaintiffs' motion for attorneys fees. Plaintiffs prevailed in an action brought under 42 U.S.C. § 1983 alleging violations of their constitutional rights. This court awarded attorneys fees in the amount of $94,680 pursuant to 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 103 S.CT 1933, 1937 (1983).

The purpose of 42 U.S.C. § 1988 is to insure "effective access to the judicial process" for persons with civil rights grievances. H.R.Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S.Rep. No. 94-1011 p. 4 (1976) (quoting *Newman v. Piggie Park Enterprises. Inc.*, 390 U.S. 400, 402 (1968). The amount of the fee, of course, must be determined by the facts of each case.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court noted:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly

rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. A party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court should also exclude from this initial fee calculation hours that were not "reasonably expended." S. Rep. No. 94-1011, p.6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority. *Copeland v. Marshall*, 205 U.S.App. D.c. 390, 401, 641 f.2d 880, 891 (1980) (en banc) (emphasis in original)

Hensley v. Eckerhart, supra, at 433-34. The Supreme Court also noted, however, that the district court may also consider other factors identified in *Johnson v. Georgia Highway Express. Inc., supra*, even though many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. See, *Hensley v. Eckerhart, supra* at n. 9, p. 434. These factors are:

(1) the time and labor required:

(2) the novelty and difficulty of the questions:

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposes by the client or the circumstances.

(8) the amount involved and the results obtained;

(9) the experience, reputation and ability of the attorney:

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

Johnson v. Georgia Highway Express, Inc. , 488 F.2d 714 (5th Cir. 1974).

The issue of attorneys fees was extensively briefed and argued before this court. For the purposes of the award, this court considered the factors set forth in *Johnson* including but not limited to the highly complex nature of litigation, the high quality of the work, the zealous manner in which attorneys for the plaintiffs pursued their cause, and the effect that this litigation had on a small firm in that such litigation required so many of the firms resources be devoted in pursuit of a single case.

After consideration of the experience of the respective attorneys as well as the market rate charged in the community by attorney with comparable skill, experience and reputation, this court determined a reasonable hourly rate for the three attorneys at $100.00 per hour. Plaintiffs submitted well documented time sheets which showed that the attorneys expended a total of 946.9 hours in this litigation. Upon examination of the affidavits

submitted, this court finds that the hours claimed were related to the claims upon which plaintiff prevailed at trial. The court considered the request for compensation for paralegal time however found that the time and rates requested failed to reflect current practices, therefore the request for paralegal time was disallowed. *Missouri v. Jenkins*, 109 S.Ct. 2463, 2471 (1989). Thus, pursuant to the lodestar method the court calculated attorneys fees at $94,680.

Plaintiffs requested an overall enhancement of 25% while defendants requested a deduction of 66% This court declined to do either. Although at first blush such an award might seem excessive in light of the nominal damages awarded, the measure of success in Civil Rights litigation of this type is not limited to the monetary damage award. There is inherent value in a judicial determination that ones constitutional rights have been violated. Accordingly, this court finds that plaintiffs' attorneys are entitled to fees in the amount of $94,680.

/s/Robert D. Kingsland
Robert D. Kingsland
UNITED STATES MAGISTRATE

Dated: September 19, 1990

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 90-2090/2091/2782EM

Ivron Butler, Frank A. Ledferd, et al.,
Appellants,

v.

Denis Dowd,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Filed: February 3, 1993

ORDER

This court has considered the application of appellants for attorneys' fees and costs on appeal and the briefs filed by both parties, including appellee's surreply filed January 25, 1993. In our view, the recent United States Supreme Court case *Farrar v. Hobby*, 113 S.Ct. 566 (1992), is not directly applicable to this case, nor to the application for fees on appeal. Nevertheless, we are mindful that had the *Farrar* decision been issued prior to the filing of the en banc opinion in this case, it may well have altered our view as to the allowability of fees at the trial

Taking all matters into consideration, we are of the view that it would be appropriate for us to discount substantially the fees sought by appellants on the appeal. Accordingly, we award and allow appellants the sum of $12,000.00 for attorneys' fees on the appeal, together with costs in the sum of $47.25.

A true copy.

Attest: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
APR 7 1993
OFFICE OF THE CLERK

No. 92-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DENIS DOWD,
Petitioner,

VS.

IVRON BUTLER, FRANK A. LEDFERD, DAVID CORDER, HERSHEL MARSH, DOYLE KIRKMAN, JAY M. FRENCH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 92-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DENIS DOWD,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATION TO THE OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, which affirmed the award of $94,680 in attorneys' fees for work performed in the district court, is reported at 979 F.2d 661 (8th Cir. 1992) (en banc). A copy of the opinion is printed as Appendix A to petitioner's submission and therefore will not be reprinted here by respondents. The subsequent Order of the Eighth Circuit Court of Appeals, which reaffirmed the award of $94,680 in attorneys' fees for work performed in the district court and which awarded $12,000 in additional attorneys' fees for work performed in the appellate court, is not reported. A copy

of the Order is printed as Exhibit F to petitioner's submission and therefore will not be reprinted here by respondents.

STATEMENT OF THE CASE

The four inmate Plaintiffs, respondents herein, brought this action under 42 U.S.C. §1983 alleging that Defendant Denis Dowd, petitioner herein, failed to protect them from homosexual rapes in violation of their Eighth Amendment rights. The Plaintiffs were between the ages of 17 and 23 and were in the care and custody of Defendant Dowd, the Superintendent of Missouri's Farmington Correctional Center (F.C.C.), when they were homosexually raped by predator prisoners known to have aggressive and violent histories. Despite their records, the predator prisoners were housed in "general population" with the Plaintiffs in accordance with Defendant Dowd's housing policy which randomly put inmates wherever there was an available bed. Each of the Plaintiffs suffered serious emotional harm from the homosexual rapes. The depression experienced by Plaintiffs Ledferd and Marsh, for example, was diagnosed by the prison psychologist as post-traumatic stress disorder. *See* Plaintiffs' Appendix at 104-105.

After a four day trial, the jury found in favor of the Plaintiffs on the issue of liability but awarded them only $1.00 each in nominal damages. The Plaintiffs moved for a partial new trial on damages and asked for injunctive relief. Defendant Dowd moved for judgment notwithstanding the verdict. The district court denied all post-trial motions and awarded the Plaintiffs attorneys' fees in the amount of $94,680, pursuant to 42 U.S.C. §1988.

On appeal, a sharply divided Eighth Circuit Court of Appeals, sitting en banc, affirmed the judgment of the district court. All thirteen members of the Court agreed that Defendant Dowd violated the Eighth Amendment by failing to protect the Plaintiffs from a pervasive risk of sexual attack. As the majority opinion explained:

> Plaintiffs presented evidence that there were at least 100 sexual assaults reported at FCC during a three-year period. During that same time frame, however, there were almost no sexual assaults assigned to the prison investigator for investigation, and Dowd never referred even one sexual assault for prosecution. There was no warning to prisoners about the risk of sexual assault. The prison personnel had received no training or instructions about how to handle sexual assaults or how to prevent them. Prisoners were assigned to general population at random, with no segregation based on their vulnerability to assault. Dr. Sable, plaintiffs' expert, testified that this practice was reckless conduct. Plaintiffs introduced an affidavit at least implying that Dowd knew plaintiffs, and others like them, were vulnerable. Protective custody was not readily available to inmates because they were required to spend extended periods of time in administrative segregation [where conditions were harshly punitive] before being admitted to protective custody. Dr. Sable testified that this is a significant barrier to inmates requiring protection. Given this evidence presented by plaintiffs, we cannot say the district court erred by denying Dowd's motion for j.n.o.v.

See Appendix A at A26-A27. In addition, all thirteen members of the Court agreed that the award of $94,680 in attorneys' fees to the Plaintiffs' court-appointed counsel was proper. *See* Appendix A at A27-A30, A31 and A36. The Court sharply disagreed, however, on the remaining issues before it. Seven members of the Court upheld the jury award of $1.00 in nominal damages for homosexual rape; six judges deemed it a "shocking injustice" and a "miscarriage of justice." According to the dissenters, "damages resulting from rape — any rape — can never be valued at only $1.00." *See* Appendix A at A37 and A41. The Court also disagreed on the issue of injunctive relief for the Plaintiffs. Seven members of the Court refused injunctive relief;

six judges would have granted it. *See* Appendix A at A24-A25, A30, and A45-A46.

The Eighth Circuit's opinion was handed down on November 11, 1992 and the mandate was issued on December 8, 1992. On December 14, 1992, the U.S. Supreme Court decided *Farrar v. Hobby*, 113 S.Ct. 566 (1992). In *Farrar*, the plaintiff recovered nominal damages, and nothing else, for the violation of an unspecified constitutional right. The Supreme Court held that he was not entitled to any attorneys' fees under these circumstances. *Id.* at 575. The Plaintiffs had filed, on December 4, 1992, a motion for appellate attorneys' fees with the Eighth Circuit. *See* Plaintiffs' Second Verified Motion for Attorneys' Fees. On December 24, 1992, Defendant Dowd filed a response to the Plaintiffs' motion. *See* Defendant's Opposition to Plaintiffs' Second Verified Motion for Attorneys' Fees. In his response, Defendant Dowd made two basic arguments. First, he argued that *Farrar* mandates that the district court's award of $94,680 in attorneys' fees must be set aside and reduced to zero because the Plaintiffs recovered only nominal damages. To this end, he asked the Eighth Circuit to recall its mandate. *Id.* at pp. 1, 4 and 6 n. 4; *see also* Defendant's Surreply Memorandum at p. 1, filed on January 25, 1993. Second, he argued that *Farrar* mandates that the Plaintiffs must be denied all compensation for attorneys' fees incurred on appeal. *Id.* at pp. 1-6.

In a memorandum filed on January 19, 1993, the Plaintiffs replied to these arguments. *See* Plaintiffs' Reply to Defendant's Opposition to Their Second Verified Motion for Attorneys' Fees. They argued that Defendant Dowd waived his "zero fee" argument by failing to assert it in a timely fashion in the district court or in the appellate court. *Id.* at pp. 1-2. In addition, they argued that *Farrar* is distinguishable from the present case. *Id.* at pp. 4-5. They pointed out that the jury verdict in their favor was clear and unequivocal. The jury found that Defendant Dowd failed to protect them from brutal homosexual rapes in violation

of the Eighth Amendment. Such a jury verdict, they argued, serves the public interest by deterring future unlawful conduct. The jury verdict in *Farrar*, by contrast, was vague and ambiguous. Indeed, it was unintelligible. Such a jury verdict cannot deter future unlawful conduct because nobody, including the defendant, can understand what it means. In addition, the Plaintiffs pointed out that their lawsuit had prompted beneficial changes in prison policies which will decrease the risk of homosexual rape for current and future inmates at the Farmington Correctional Facility. As such, it served the public interest. The plaintiff in *Farrar*, by contrast, did not bring about any beneficial changes by filing his lawsuit.

The Eighth Circuit issued a one-page unpublished Order on February 3, 1993. In its Order the Court observed:

> In our view, the recent United States Supreme Court case of *Farrar v. Hobby*, 113 S.Ct. 566 (1992), is not directly applicable to this case, nor to the application for fees on appeal.

See Appendix F at A56. Although it did not explain its reasoning, the Court refused to recall the mandate. Thus, it left undisturbed the fee award of $94,680 for work performed in the district court. Also, the Court refused to deny attorneys' fees for work performed on appeal. Instead, it awarded the Plaintiffs $12,000 in appellate attorneys' fees. *Id.* Dissatisfied with this result, Defendant Dowd filed a petition for a writ of certiorari with the U.S. Supreme Court seeking review of the Eighth Circuit's rulings against it.

SUMMARY OF ARGUMENT

There are two basic reasons why the petition for certiorari should be denied. First, the Eighth Circuit's rulings on attorneys' fees are correct on the merits. The facts in this case are clearly distinguishable from the facts in *Farrar*. Therefore,

Farrar is not controlling. Second, *Farrar* is only four months old. It is too soon for the Supreme Court to revisit a legal issue it recently addressed only a short while ago. There will be time enough, should the circumstances warrant, for the Court to clarify the meaning of *Farrar*. In the meantime, it should exercise restraint and allow the law under *Farrar* to evolve in the lower federal courts. A remand to the Eighth Circuit for further consideration of the fee awards in light of *Farrar* would be unjustified. The Eighth Circuit has already ruled that *Farrar* is "not directly applicable to this case, nor to the application for fees on appeal." *See* Appendix F at A56. A remand under these circumstances would be inappropriate. The petition for certiorari must be denied outright.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

Defendant Dowd contends that the Eighth Circuit's rulings (1) upholding the award of $94,680 in attorneys' fees for work performed in the district court and (2) awarding $12,000 in attorneys' fees for work performed in the appellate court are contrary to *Farrar v. Hobby*, 113 S.Ct. 566 (1992). Defendant is mistaken on both counts. Each will be discussed in turn.

1. Attorneys' Fees in the District Court

At trial, the Plaintiffs succeeded in obtaining (1) a jury finding that Defendant Dowd failed to protect them from homosexual rape in violation of the Eighth Amendment; (2) $4.00 in nominal damages; and (3) $94,680 in attorneys' fees. This was no small achievement. Defendant, however, points to the U.S. Supreme Court's recent decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992), and argues that Plaintiffs cannot recover any attorneys' fees at all in this case. In *Farrar*, the Supreme Court held that a plaintiff who recovers nominal damages, and nothing else, will "often" or "usually" or "under some circumstances" not be entitled to any attorneys' fees. *Id.* at 575. Defendant argues that the only thing of value the Plaintiffs obtained in the district court was the $94,680 in attorneys' fees which, under *Farrar*, they cannot be allowed to keep. This argument fails for several reasons.

First, Defendant Dowd has waived the argument by failing to assert it in a timely fashion. Defendant never argued in the district court, or in the appellate court prior to the Eighth Circuit's opinion, that the only reasonable fee for the Plaintiffs was no fee at all. Rather, Defendant argued that the fees awarded were excessive and should be reduced. *See, e.g.*, Defendant's Opening Brief at pp. 1 and 32. By failing to argue that fees should be zero, Defendant acknowledged that the Plaintiffs were entitled to at least some fees. In its en banc opinion, the Eighth Circuit recognized this important fact:

> The argument before us is that the attorneys' fees should be reduced. This is a different issue from the question of whether a plaintiff can get attorneys' fees when they are awarded only nominal damages at trial. . . . Because this issue is not before us in this case, we do not address it.

See Appendix A at A28 n. 23. Defendant Dowd made his "zero fee" argument for the first time in response to the Plaintiffs' post-opinion motion for appellate attorneys' fees. He has no legitimate excuse for waiting until then, after the opinion and mandate had been issued, to raise an argument he could have raised in the district court or in the appellate court. There was no controlling U.S. Supreme Court decision which foreclosed Defendant from making such an argument. On the contrary, other defendants in other cases were successfully making the argument. *See, e.g., Estate of Farrar v. Cain*, 941 F.2d 1311, 1317 (5th Cir. 1991); *Spencer v. General Elec. Co.*, 894 F.2d 651, 652 (4th Cir. 1990). Because it comes too late, Defendant's argument that he is not liable for any attorneys' fees at all in this case has been waived. *Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984); *United States v. Byers*, 740 F.2d 1104, 1115-1116 n. 11 and 1134-1135 (D.C. Cir. 1984).

Second, Defendant Dowd errs when he says the district court's award of $94,680 in attorneys' fees is invalid under *Farrar*. The Supreme Court did not hold that a nominal damages award will *never* justify a fee award. On the contrary, the Court refused to adopt any such per se rule. 113 S.Ct. at 575. Under what circumstances will a nominal damages award justify a fee award under *Farrar*? Justice Thomas, who wrote the majority opinion in the case, did not answer this question. However, Justice O'Connor, who joined Justice Thomas' opinion and whose fifth vote was necessary to support it, did answer the question:

> That is not to say that *all* nominal damage awards are *de minimus*. Nominal relief does not necessarily a nominal

> victory make. . . . The difference between the amount recovered and the damages sought is not the only consideration. . . . An award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved. Accordingly, the courts must look to other factors. One is the significance of the legal issue on which the plaintiff claims to have prevailed. . . . [Another is] the public purpose [the] litigation might have served.

Id. at 578 (O'Connor, J., concurring). Justice O'Connor's reasoning is sound. It echoes what Justice Powell said several years ago in a concurring opinion in *Riverside v. Rivera*, 477 U.S. 561 (1986). In *Riverside*, the Supreme Court upheld a fee award of $245,456 for the recovery of $33,350 in damages. Justice Powell wrote:

> Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered. In this case, for example, the District Court made an explicit finding that the "public interest" had been served by the jury's verdict that the warrantless entry was lawless and unconstitutional. Although the finding of a Fourth Amendment violation hardly can be considered a new constitutional ruling, in the special circumstances of this case, the vindication of the asserted Fourth Amendment right may well have served a public interest, supporting the amount of the fees awarded.

Id. at 585-586 (Powell, J., concurring). Significantly, the Eighth Circuit in this case, and Justice Thomas in the *Farrar* case, both cited Justice Powell's concurring opinion with approval. *See* Appendix A at A29; *Farrar*, 113 S.Ct. at 575.

Defendant Dowd appears to accept Justice O'Connor's concurring opinion as a correct statement of the governing law. *See* Petition for Certiorari at p. 6. At the same time, however, he stubbornly refuses to come to grips with the fact that the Plaintiffs in this case, unlike the plaintiff in *Farrar*, prevailed on a significant legal issue which served an important public interest.

The jury verdict in *Farrar*, unlike the jury verdict in the case at bar, was vague and ambiguous. Indeed, it was unintelligible. The plaintiff in *Farrar* owned and operated a home for disturbed teens. He brought a lawsuit under 42 U.S.C. §1983 alleging that the Lieutenant Governor of Texas, and other state officials, entered into a conspiracy to deprive him of his civil rights by closing the home. The jury found the Lieutenant Governor innocent of the charge of conspiracy. Nevertheless, the jury found that he had deprived the plaintiff of a civil right. *Estate of Farrar v. Cain*, 941 F.2d 1311, 1312 (5th Cir. 1991). The jury verdict was perplexing. The nature of the civil rights violation, to put it mildly, was unclear. *Id.* at 1317 (Reavley, J., dissenting). Such a jury verdict could not serve the public interest by deterring future unlawful conduct because nobody, including the defendant, could understand what it meant. Justice Thomas, in his majority opinion, was careful to point out that the plaintiff's rights had been violated in some "unspecified" way. 113 S.Ct. at 574. Similarly, Justice O'Connor, in her concurring opinion, emphasized that the jury returned a "regrettably obtuse" verdict which, because it carried "no discernable meaning," could not deter lawless conduct in the future. 113 S.Ct. at 578-579. By contrast, the jury verdict in the case at bar was clear and unequivocal. The jury found that Defendant Dowd failed to protect the Plaintiffs from brutal homosexual rapes in violation of the Eighth Amendment. *See* Appendix at A15-A17, A37, A40 and A44-A45. Such a jury verdict serves the public interest by

deterring future unlawful conduct by Defendant Dowd and others like him.[1]

A jury finding of a serious violation of the Eighth Amendment has a substantial deterrent effect. What the Plaintiffs said in the district court, almost three years ago, bears repeating here:

> This litigation has an undeniable important public character. It must be remembered here that the defendant maintained always that the plaintiffs (and others like them) were *never* at any particular risk of harm from sexual attacks by other prisoners at F.C.C. The jury said defendant was wrong, that defendant, if he did not know of it, should have known of the risk. Presumably this litigation has served an important educational role. No longer can any F.C.C. personnel say with any legitimacy that prisoners at F.C.C. are not at any risk of harm from sexual attack by other prisoners. Without doubt, this litigation has had its impact on the personalities at Farmington Correctional Center who now understand they have some accountability to those they watch over and understand also it is in their own personal interest to insure that those prisoners subject to sexual attack are properly cared for. In sum, whereas Mr. Dowd vehemently denied any obligation to protect his wards against sexual assaults, the incumbent Superintendent and his staff must realize that there is a risk of sexual

[1] Defendant mentions the fact, as if it is meaningful, that Judge Beam thought the jury verdict was vague and ambiguous. According to Judge Beam, the jury might have thought the Plaintiffs were victims of threatened, rather than actual, rape. *See* Appendix A at A32. Defendant neglects to mention the fact, however, that the other twelve members of the Court rejected Judge Beam's position. They all agreed the jury verdict was clear and unequivocal: the Plaintiffs were raped. Moreover, Defendant's argument does not come in good grace. At trial, Defendant did not deny that the rapes took place. On the contrary, Defendant's whole pitch to the jury was that the rapes took place but that he was not responsible for them. *See* Appendix A at A37 and A43.

> assault for certain prisoners, that prisoners have been and are being assaulted within F.C.C., and the failure to protect these prisoners may require that they account for their conduct in the federal district court. Thus, this litigation will likely mean that other young men will not have to endure the horror plaintiffs experienced while in the care and custody of the Department of Corrections. Although this result is important, it can *not* be measured in dollars but is a sufficient service, without more, to support the fees requested by appointed counsel.

See Plaintiffs' Reply Memorandum in Support of an Award of Attorneys' Fees at pp. 5-6, filed on July 13, 1990. The Plaintiffs' lawsuit, and their success in proving liability, will serve to deter additional unconstitutional conduct by Defendant Dowd and other prison officials. As such, the relevant indicia of success under Justice O'Connor's concurring opinion — the significance of the legal issue on which the Plaintiffs have prevailed and the public purpose served — both point to a significant victory by the Plaintiffs which justifies the district court's award of fees in the amount of $94,680.[2]

In this connection, it is important to keep in mind that a plaintiff can recover attorneys' fees when his lawsuit acts as a "catalyst" in prompting the defendant to take remedial action to meet his claim. *Hanrahan v. Hampton*, 446 U.S. 758, 756-757

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[2] Justice O'Connor recognized that in some cases a nominal damage award, if accompanied by a large fee award, will deter future lawless conduct by the defendant. 113 S.Ct. at 578-579. This is such a case. The fee award of $94,680 will serve as a vivid reminder to Defendant Dowd, and his successors, that they cannot ignore their constitutional duty to protect inmates from violent sexual assault. The Supreme Court has said it best: "the potential liability of §1983 defendants for attorneys' fees ... provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore [constitutional] rights." *Carey v. Piphus*, 435 U.S. 247, 257 n. 11 (1978).

(1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). That is what happened here. In upholding the award of $94,680 in attorneys' fees, the Eighth Circuit correctly noted that the Plaintiffs' lawsuit prompted beneficial changes in prison policies which serve an important public purpose:

> The record reflects that the litigation did serve the interests of prisoners other than the plaintiffs, as the defendant subsequently instituted some of the safety measures requested by the plaintiffs. . . . Specifically, the FCC instituted a new policy requiring that the doors of all prisoners be open during its "open wing" period.

See Appendix A at A29 and n. 25. This was an important victory for the Plaintiffs because the evidence at trial showed that they were often raped by other inmates behind closed cell doors during "open wing" hours at the prison. *See* Appendix A at A5-A8, A10, A24 and A42; *see also* Tr. IV at 52-53, 86-87.

Significantly, the Eighth Circuit referred to safety measures (plural) and not to safety measure (singular). There were other remedial measures which Defendant Dowd took in response to the Plaintiffs' lawsuit. For example, he instituted a "standing count" system for the night lockdown. Previously, prison guards merely counted bodies; they made no effort to determine whether the right inmates were in the right cells. As a result, predator inmates were able to hold the Plaintiffs captive overnight in cells and repeatedly rape them. *See* Appendix A at A4, A6, A8, A42 and A46. Defendant Dowd changed the policy so that inmates must present themselves at their cell doors for the night count. *See* Tr. II at 65-66; Tr. III at 132-133. Also, there was no classification system at the prison prior to the Plaintiffs' lawsuit. Inmates were assigned to cells at random; no effort was made to separate non-violent inmates from violent inmates. *See* Appendix A at A12 and A26. Six months after the lawsuit was filed, however, Defendant Dowd instituted a classification system. *See* Appellant's Appendix at 2; Tr. III at 63-65.

Without doubt, homosexual rape interferes with an inmate's rehabilitation. In addition, it interferes with order and discipline in the prison. These are compelling governmental concerns. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989); *Pell v. Procunier*, 417 U.S. 817, 823 (1974). The Eighth Circuit correctly recognized that the Plaintiffs' lawsuit has prompted remedial action by the Defendant which will further the public goals of rehabilitation, and order and discipline in the prison, by decreasing the risk of homosexual rape for countless numbers of current and future inmates at the Farmington Correctional Center. Therefore, it correctly upheld the district court's award of $94,680 in attorneys' fees.[3]

Farrar does not undermine the Eighth Circuit's reasoning. The plaintiff in *Farrar* did not bring about any beneficial change by filing his lawsuit. By contrast, the Plaintiffs here did. At least three federal appellate courts have held, in cases decided after *Farrar*, that the "catalyst" theory for an award of attorneys' fees remains valid. *Paris v. U.S. Department of Housing and Urban Development*, No. 92-1763 (1st Cir., Mar. 4, 1993); *Citizens Against Tax Waste v. Westerville City School*, No. 91-3924 (6th Cir., Feb. 3, 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225 (5th Cir., Jan. 20, 1993). The Fifth Circuit's recent decision in *Pembroke* is particularly instructive. In *Pembroke*, prisoners at a county jail brought a lawsuit under 42 U.S.C. §1983 alleging that conditions at the jail violated their constitutional rights. In response to the lawsuit, the defendants corrected the unconstitutional conditions. As a result, the plaintiffs were denied declaratory and injunctive relief. They did not seek any monetary relief.

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[3] Defendant Dowd suggests there was no causal connection between the Plaintiffs' lawsuit and the safety measures he adopted. However, the Eighth Circuit, which is intimately familiar with the litigation, found that such a causal connection existed. In making this finding, the Court acted within the wide latitude accorded to it. The Supreme Court is in no position to second-guess the Eighth Circuit's factual determinations.

On appeal, the Fifth Circuit held that the plaintiffs were nevertheless entitled to an award of reasonable attorneys' fees:

> *Farrar* dealt with prevailing party status and the award of attorneys' fees in the context of nominal damages and is thus distinguishable from the present case. . . . Unlike *Farrar*, changes in the legal relationship between the plaintiffs and defendants in this case were wrought by the bringing of the litigation itself, not with recovery of monetary damages. Thus, although the plaintiffs received no monetary award, they are still entitled to an award of reasonable attorneys' fees.

981 F.2d at 231 n. 27. The same reasoning applies with equal force to this case. The Plaintiffs here, like the plaintiffs in *Pembroke*, brought about important beneficial changes in prison policies which warrant a fully compensatory award of attorneys' fees.[4]

Defendant suggests that even if the award of $94,680 in attorneys' fees cannot be reduced to zero under *Farrar* a "dramatic reduction" is necessary in light of the "limited success" achieved by the Plaintiffs. The Eighth Circuit, however, has expressly addressed and rejected this argument:

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[4] Defendant portrays this case as one about money only. This is incorrect. Plaintiffs' amended complaint, filed by court-appointed counsel, did *not* request any particular dollar amount in damages. Moreover, Plaintiffs' counsel did *not* ask the jury to award the Plaintiffs any particular dollar amount in damages. Plaintiffs' ultimate focus in this case was not dollars but exposure of the state's indifference to their plight. This is evident from a letter written by Plaintiffs' counsel to Defendant's counsel prior to trial: "So far I have talked with plaintiffs about transfers, money and changes in procedures and practices. . . . Assuming the necessary 'monies' were available, a settlement would not promote the change [the plaintiffs] believe necessary in the procedures and practices at the FCC. Plaintiffs figure the only way to achieve the change they believe necessary is to alert the public of their circumstances and that a trial will help get that job done." *See* Plaintiffs' Reply Memorandum, *supra*, at p. 4.

> [T]he magistrate judge specifically considered the level of success in calculating his award. The magistrate judge stated that . . . "the measure of success in Civil Rights litigation of this type is not limited to the monetary damage award. There is inherent value in a determination that one's constitutional rights have been violated . . . ." The record reflects that the litigation did serve the interest of prisoners other than the plaintiffs as the defendant subsequently instituted some of the safety measures requested by the plaintiffs . . . . In addition, the Court awarded attorneys' fees to counsel based on a flat hourly rate of $100.00 even though plaintiffs' lead counsel presented substantial evidence supporting a fee of $175.00 an hour for his time.

See Appendix A at A29. The Eighth Circuit's reasoning is sound and does not conflict with *Farrar* in any way. On the contrary, it is fully consistent with Justice O'Connor's controlling view that courts must consider (1) the significance of the legal issue on which the plaintiff has prevailed and (2) the public purpose served by the litigation. Moreover, as the Eighth Circuit noted, the district court has *already* made a "dramatic reduction" in the fee award for work performed in the district court by slashing lead counsel's hourly rate by 43%. No further downward adjustment is justified and the district court's award of $94,680 in fees must be left undisturbed.

There is no merit to Defendant Dowd's argument that the Supreme Court should "summarily reverse" the Eighth Circuit's judgment. Summary reversal is an exceptional disposition reserved for those rare cases where the lower court's ruling is so patently erroneous that full briefing and oral argument would be a waste of time. *See* Stern, Gressman and Shapiro, *Supreme Court Practice* §5.12 (Sixth ed. 1986). That is not the situation here. The facts here are clearly distinguishable from the facts in *Farrar*. Accordingly, *Farrar* does not dictate reversal of the Eighth Circuit's judgment.

Alternatively, Defendant argues that the Supreme Court should remand the case to the Eighth Circuit for further consideration of the fee award of $94,680 in light of *Farrar*. The problem with this argument, of course, is that the Eighth Circuit has already considered the impact of *Farrar* on this case. The Court ruled that *Farrar* is "not directly applicable to this case, nor to the application for fees on appeal." *See* Appendix F at A56. Without doubt, the Court believed the challenged fee award was valid under *Farrar*; otherwise it would have vacated it. The mandate was issued on December 8, 1992; *Farrar* was decided on December 14, 1992. Defendant Dowd specifically asked the Eighth Circuit to recall the mandate and to set aside the fee award in light of *Farrar*. This was a predictable request. Appellate courts will routinely recall the mandate to give effect to a supervening decision of the U.S. Supreme Court. *See, e.g., Zipfel v. Halliburton Co.*, 861 F.2d 565, 567-568 (9th Cir. 1988); *Judkins v. Beech Aircraft Corp.*, 745 F.2d 1330, 1331-1332 (11th Cir. 1984). The Eighth Circuit refused to recall the mandate, however, and elected instead to leave the fee award intact. Thus, the Eighth Circuit made a clear decision to reaffirm the award of $94,680 in attorneys' fees despite the *Farrar* case. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 378-379 n. 1 (1990); *Clinkenbeard v. Central Southwest Oil Corp.*, 526 F.2d 649, 651-652 (5th Cir. 1976). The Court's decision sinks Defendant's remand argument. The Supreme Court cannot remand the case to the Eighth Circuit, with directions to consider the impact of *Farrar* on the case, when the Eighth Circuit has *already* considered the impact of *Farrar* on the case. The Supreme Court must either grant certiorari, and set the case for full briefing and oral argument, or it must deny certiorari outright. There is no middle course to follow.

Defendant's reliance on *Nichols v. Romberg*, 113 S.Ct. 1038 (Jan. 19, 1993), and *Kolodzieczak v. Friend*, 113 S.Ct. 1038 (Jan. 19, 1993) is misplaced. To be sure, the Supreme Court remanded these cases to the Ninth Circuit for further consideration of the

fee awards in light of *Farrar*. But the cases were remanded because the Ninth Circuit never had the opportunity to consider the impact, if any, of *Farrar* on the fee awards. The *Nichols* case was decided five months before *Farrar*; the *Kolodzieczak* case was decided seven months before *Farrar*. The Eighth Circuit, by contrast, has ruled that *Farrar* does not apply to this case. *See* Appendix F at A56.[5]

2. Attorneys' Fees in the Appellate Court

On appeal to the Eighth Circuit, Defendant Dowd argued that (1) he was not liable at all for the homosexual rapes; (2) the jury instruction on liability was erroneous; and (3) the award of $94,680 in attorneys' fees was excessive in light of the results obtained. He lost on all three issues. As a result, the Eighth Circuit awarded the Plaintiffs $12,000 in appellate attorneys' fees for time expended by their counsel in successfully resisting the Defendant's arguments. The award was not contrary to *Farrar*. As discussed, the Plaintiffs achieved an important victory in the district court which served the public interest. Because they succeeded on appeal in preserving this important victory, they were entitled to the $12,000 in appellate attorneys' fees. There is no warrant to upset the Eighth Circuit's award and it should be left undisturbed.

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[5] The Eighth Circuit mused in passing that "had the *Farrar* decision been issued prior to the filing of the en banc opinion in this case, it may well have altered our view as to the allowability of fees at the trial." *See* Appendix F at A56. But this gratuitous dictum cannot be construed to contradict the Court's clear holding that *Farrar* is "not directly applicable to this case, nor to the application for fees on appeal." *Id.* As noted, if it thought the challenged fee award was invalid under *Farrar*, the Court would have vacated it. Significantly, it did not. With courts, as with people, actions speak louder than words.

CONCLUSION

Petitioner has failed to demonstrate the existence of any special or important reasons why a writ of certiorari should be granted in this case. *See* Sup.Ct. Rule 10. Accordingly, the writ should be denied.

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